UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

OHIO PUBLIC EMPLOYEES RETIREMENT SYSTEM, On Behalf of Itself and all Others Similarly Situated, Plaintiff, vs. FEDERAL HOME LOAN MORTGAGE CORPORATION a/k/a FREDDIE MAC, RICHARD F. SYRON, PATRICIA L. COOK, ANTHONY S. PISZEL, and EUGENE M. McQUADE, Defendants.	CIVIL ACTION NO. 4:08-cv-160 JUDGE JOHN R. ADAMS MAGISTRATE JUDGE JAMES S. GALLAS

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS'
<u>MOTION TO DISMISS THE AMENDED COMPLAINT WITH PREJUDICE</u>

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INTRODUCTION

Defendant Federal Home Loan Mortgage Corporation ("Freddie Mac"), and Richard F. Syron, Patricia L. Cook, Anthony S. Piszel, and Eugene M. McQuade (the "Individual Defendants" and collectively with Freddie Mac, "Defendants") hereby submit this Memorandum of Law in Support of their Motion to Dismiss Plaintiff's Amended Complaint.

Congress enacted the Private Securities Litigation Reform Act of 1995 (the "PSLRA") in order to deter "baseless and extortionate securities lawsuits." H.R. Rep. No. 104-369, at 32 (1995) (Conf. Rep.), as reprinted in 1995 U.S.C.C.A.N. 730, 731. The legislation was:

> prompted by significant evidence of abuse in private securities lawsuits . . . [which] include . . . the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in the issuer's stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action[.]

Id. at 31, as reprinted in 1995 U.S.C.C.A.N. at 730 (emphasis added). "The 'purpose' of the PSLRA is to screen out lawsuits having no factual basis [and] to prevent harassing strike suits. . . ." PR Diamonds, Inc. v. Chandler, 364 F.3d 671, 700 (6th Cir. 2004). This litigation is exactly the type of baseless securities "strike suit" that the PSLRA was designed to prevent.

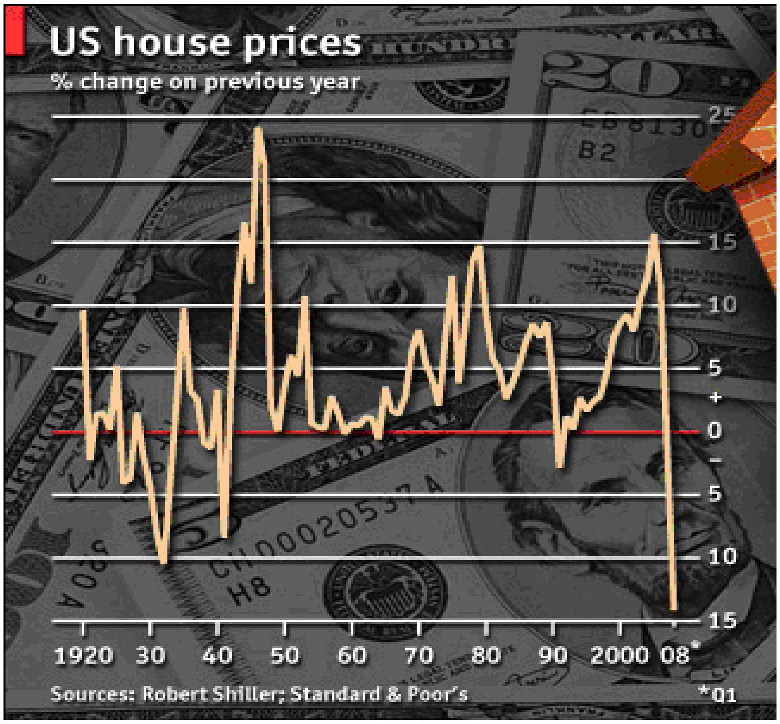
PRELIMINARY STATEMENT

Freddie Mac is a government-sponsored enterprise ("GSE") chartered by Congress in 1970 to promote homeownership by providing liquidity, stability and affordability to the home mortgage market. Amended Complaint ("AC") ¶ 1. To accomplish its Congressionally-mandated mission, Freddie Mac purchases mortgages and mortgage-related securities, thereby providing a flow of capital to mortgage lenders. See infra pp. 4-5. Under the terms of its charter, Freddie Mac's business is limited to the purchase of home mortgages and securities; it may not originate loans or engage in any other business. 12 U.S.C. § 1454.

Earlier in this decade, as Freddie Mac pursued its mission by purchasing mortgage loans and mortgage-related securities, real estate values sky-rocketed throughout the country. See infra pp. 4-5. Throughout that period, Freddie Mac repeatedly and extensively warned investors

that, if real estate values declined, or credit tightened, or interest rates changed, it was likely to incur unavoidable losses. Id.

Then, in 2007, this country was blindsided by the single largest decline in single-home values in recorded history. App. 1 (Dropping a Brick, The Economist, (May 29, 2008)). This dramatic rise and sudden drop in U.S. home values is illustrated by the chart below:[1]



When house prices plummeted in 2007, credit tightened severely and loan defaults increased dramatically.[2] Just as Freddie Mac had warned investors, its financial results and its

[1] This Court may take judicial notice of market phenomena. See, e.g., In re 2007 NovaStar Fin., Inc., Sec. Litig., No. 07-0139, 2008 U.S. Dist. LEXIS 44166, at *2 (W.D. Mo. June 4, 2008) (taking judicial notice of reversals in the housing industry) (applying Tellabs, Inc. v Makor Issues & Rights, Ltd., 127 S. Ct. 2499 (2007)). This Court properly may also consider documents referenced in the Amended Complaint, matters of which the Court may take judicial notice, including public records, and documents integral to the complaint, without turning this motion into one for summary judgment. See Tellabs, 127 S. Ct. at 2509 ("[C]ourts must consider the complaint in its entirety, as well as . . . documents incorporated into the complaint by reference . . . ."); Wyser-Pratte Mgmt. Co. v. Telxon Corp., 413 F.3d 553, 560 (6th Cir. 2005) ("In addition to the allegations in the complaint, the court may also consider other materials that are integral to the complaint, are public records, or are otherwise appropriate for the taking of judicial notice."). The Appendix filed herewith contains complete copies of documents referenced herein as "App. ___."

[2] See App. 49 at 1, 23-25, 37-38 (Board of Governors of the Federal Reserve System, Monetary Policy Report to the Congress, submitted pursuant to section 2B of the Federal Reserve Act, Feb. 27, 2008, available at http://www.federalreserve.gov/boarddocs/hh/2008/February/ FullReport.pdf) (describing steep drop of credit market in July - Aug. 2007); see supra n.1.

stock price suffered after those macro-economic events unexpectedly tore through the U.S. economy. Virtually every major financial institution in the country was taken by surprise by these events and incurred losses similar to, or greater than, those incurred by Freddie Mac. Nonetheless, after Freddie Mac announced losses in November 2007, Plaintiff filed a knee-jerk lawsuit alleging that Freddie Mac and members of its senior management engaged in "fraud."

The losses about which Plaintiff complains did not result from fraud by anyone at Freddie Mac. It is thus not surprising that Plaintiff falls woefully short of its pleading obligations under the PLSRA and Rules 9(b) and 12(b)(6). Indeed, Plaintiff has not identified a single challenged statement that was false, let alone knowingly false, when made. See infra Part II.B. Instead, Plaintiff repeatedly relies on distortions and misrepresentations of what the Defendants actually said. For example, one of Plaintiff's principal contentions is that Freddie Mac "continually, repeatedly, and publicly" stated that it "had no exposure to or risk of loss from subprime and non-traditional mortgages." AC ¶ 1. Yet this contention is belied by the very documents on which Plaintiff relies, which repeatedly disclosed both the extent of Freddie Mac's participation in the subprime and non-traditional markets and the risks associated with that aspect of its business. See infra Part II.A.3. In addition, much of Plaintiff's case rests on claims of corporate mismanagement, which is not actionable under federal securities law. See infra Part II.A.2.

Furthermore, Plaintiff's accusation that Freddie Mac's CEO, CFO, and COO engaged in "insider trading" is a complete fabrication. None of those individuals sold a single share of Freddie Mac stock during the proposed class period ("Class Period").[3] See infra Part I.B.3.a. In fact, rather than benefit from any ostensible trading, as the unprecedented decline in the real estate and credit markets wreaked havoc on Freddie Mac's business and the world economy, the Individual Defendants -- Freddie Mac's most senior management at that time -- saw the value of **their own** investments in Freddie Mac decline by over **$38 million** during the Class Period. See infra Part I.B.3.a. In addition, Freddie Mac itself **bought** over **$2.2 billion** in its own stock

[3] As the Forms 4 on which Plaintiff relies plainly indicate, every single "sale" that Plaintiff attributes to Freddie Mac's CEO, CFO, or COO was **not** a **sale**, but a "**forfeiture**." See infra Part I.B.3.a.

during the Class Period. These facts are flatly inconsistent with Plaintiff's concocted allegations of fraud. See infra Part I.B.3.b.

Failing to predict a historically unprecedented drop in house prices, or the inevitable losses it triggered, does not constitute securities fraud. As the Supreme Court recently reaffirmed, such allegations of "fraud by hindsight" cannot state a claim under the federal securities laws. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2508 (2007); see also In re Goodyear Tire & Rubber Co. Sec. Litig., 436 F. Supp. 2d 873, 903 (N.D. Ohio 2006) ("What Plaintiffs attempt to do is to plead 'fraud by hindsight,' a technique that has been flatly rejected by [the] Sixth Circuit."). Plaintiff's Amended Complaint should be dismissed in its entirety, with prejudice.

FACTS

Freddie Mac's Mission

Freddie Mac is a federally-chartered corporation, created by Congress in 1970 "to serve the public interest by increasing the availability of mortgages on housing for low- and moderate-income families and by promoting nationwide access to mortgages." Am. Bankers Mortgage Corp. v. Fed. Home Loan Mortgage Corp., 75 F.3d 1401, 1406-07 (9th Cir. 1996); see also App. 3 (Freddie Mac's 2006 Annual Report) (Freddie Mac's "mission is to provide liquidity, stability and affordability to the U.S. housing market").[4]

Freddie Mac fulfills its statutory mission by purchasing home mortgages from financial institutions such as banks and mortgage companies. See German v. Fed. Home Loan Mortgage Corp., 885 F. Supp. 537, 544 (S.D.N.Y. 1995). Freddie Mac packages those mortgages into securities that it sells in the capital markets (its "Guarantee Portfolio"), and it also purchases mortgage-related securities created by others (its "Retained Portfolio"), thereby facilitating the flow of funds between capital and the mortgage markets. App. 3 at 1; AC ¶ 23. Under its

[4] See also 12 U.S.C. § 4501 (2006) (Freddie Mac has "an affirmative obligation to facilitate the financing of affordable housing for low- and moderate-income families in a manner consistent with their overall public purposes, . . . while maintaining a strong financial condition and a reasonable economic return").

charter, Freddie Mac may purchase a variety of mortgages and mortgage-backed securities, but it must meet certain purchase goals set by the Department of Housing and Urban Development ("HUD"). That is, Freddie Mac must purchase a certain amount of mortgages and/or mortgage-related securities backed by properties in underserved, low- and moderate-income areas.[5]

In 2004, HUD stated that "[i]ncreasing homeownership [was] a national priority," and it increased Freddie Mac's home purchase subgoals to "levels at or near the high end of the estimated market range for each goal category by 2008." App. 42 (69 Fed. Reg. 63,581, 63,597 (Nov. 2, 2004)).[6] As a means of achieving these higher goals, HUD urged Freddie Mac to increase its participation in the subprime market. As HUD stated: "If the GSEs reach deeper into the subprime market, more borrowers will benefit from the advantages that greater stability and standardization create." Id. at 63,601.[7]

Nonetheless, throughout the Class Period, the vast majority of the mortgage loans that Freddie Mac held were traditional mortgage loans, not "non-traditional" products such as subprime or Alt-A loans.[8] In fact, only approximately 1% of the loans in Freddie Mac's $1.7 trillion dollar Guarantee Portfolio are subprime, and more than 90% are traditional, prime mortgages. See App. 38 at 8 (Freddie Mac's Third Quarter 2007 Financial Results Slide Presentation) (Nov. 20, 2007) (only 1% are characterized as having FICO scores[9] less than 620 and loan to value ratios greater than 90%, i.e., subprime). Likewise, almost 80% of Freddie

[5] The goals and subgoals HUD sets for Freddie Mac are "intended to expand housing opportunities for low- and moderate-income families, low-income families living in low-income areas, very low-income families and families living in HUD-defined underserved areas." App. 3 at 6 (2006 Annual Report).

[6] HUD sets housing goals every three years, and the housing goal targets for 2005-2008 increased substantially from the 2001-2004 period. See App. 42 (69 Fed. Reg. at 63,590 Table 1).

[7] At that time, Freddie Mac "cautioned that the struggle to meet high goals for low-income groups could cause the GSEs to relax underwriting standards and/or extend loans to people who are unprepared." App. 42 (69 Fed. Reg. at 63601). Nonetheless, consistent with its mission, Freddie Mac bore an obligation to comply with HUD's directive and provided further support for the subprime market. Indeed, pursuant to the applicable federal regulations, HUD has the authority to take enforcement action against Freddie Mac in the event it fails to meet any feasible goal or subgoal that HUD has set. App. 3 at 7 (2006 Annual Report); see also 12 U.S.C. § 4566 (monitoring and enforcing compliance with housing goals).

[8] Although there is no universally accepted definition of Alt-A loans, many industry participants classify loans as Alt-A where the underwriting process has been streamlined in order to reduce the documentation requirements of the borrower or to allow alternative documentation. App. 5 at 94 (2007 Annual Report).

[9] Developed by Fair, Isaac and Co., FICO scores, ranked on a scale of approximately 300 to 850 points, "are the most commonly used credit scores today." App. 3 at 71 (2006 Annual Report).

Mac's Retained Portfolio consists of traditional, prime loans. See id. at 22 (Non-Agency[10] investments backed by subprime loans are only 15% and Non-Agency investments backed by Alt-A loans are only 7%).[11] The very documents that Plaintiff cites in its Amended Complaint plainly state these facts, and the Amended Complaint does not contest their accuracy.

Moreover, to the extent that Freddie Mac increased its participation in the subprime mortgage market during the Class Period, it did so in the most prudent way possible, i.e., by purchasing AAA rated bonds backed by subprime loans. Such bonds bear far less risk than collateralized debt obligations (CDO's), portfolios of subprime loans, or even other, lower-rated tiers of bonds backed by subprime loans. AC ¶ 114; see also App. 3 at 69 (2006 Annual Report) ("[A]t December 31, 2006 and 2005, we held approximately $124 billion and $139 billion, respectively, of non-agency mortgage-related securities backed by subprime loans. These securities include significant credit enhancement based on their structure and more than 99.9 percent of these securities were rated AAA at December 31, 2006.") (emphasis added). AAA bonds receive "[t]he highest rating assigned by [a] rating agency[, and their] [c]apacity to pay interest and repay principal is extremely strong," due to the debt subordination that underlies and protects the AAA level. App. 44 (Kenneth G. Lore & Cameron L. Cowan, Mortgage-Backed Sec.: Dev. & Trends in the Secondary Mortgage Market, Table 9.1 (2007-2008 ed.)). As HUD has specifically acknowledged, Freddie Mac has "been prudent in [its] pursuit of subprime lending, focusing on the top part of the market." App. 42 (69 Fed. Reg. at 63,601).

Freddie Mac's Extensive Warnings To Investors Regarding The Risks Inherent In Its Business

Freddie Mac warned investors extensively of the numerous risks inherent in its business, including the risks posed by a decline in home values, interest rate changes, a tightening of credit and the impact of its affordable housing mission. For example, in its 2005 Annual Report,

[10] Non-agency investments include all loans or mortgage-backed securities not guaranteed by Freddie Mac, Fannie Mae or any like government agency. See App. 5 at 5 (2007 Annual Report).

[11] See AC ¶¶ 21-26 (describing the Guarantee and Retained portfolios).

Freddie Mac explicitly warned investors of the risks posed by a potential decline in U.S. housing prices:

> ***A general decline in U.S. housing prices or in activity in the U.S. housing market could negatively impact our earnings.*** House prices have risen significantly over the last ten years, and have grown very dramatically over the last three years. This house price appreciation has increased the values of properties underlying the mortgages in our portfolio. ***A reversal of this strong home price appreciation in any of the geographic markets we serve could result in an increase in delinquencies or defaults and a higher level of credit-related losses, which could reduce our earnings***.

App. 2 at 14 (2005 Annual Report) (emphasis added).

Freddie Mac updated its risk disclosures regarding a potential decline in housing prices in its 2006 Annual Report, and further warned investors about the slowing of U.S. house price appreciation and its potential impact on Freddie Mac's earnings:

> ***A general decline in U.S. housing prices or changes in the U.S. housing market could negatively impact our business and earnings.*** The rate of home price appreciation in the U.S. declined in 2006 as the housing market slowed. This decline follows a decade of strong appreciation and particularly dramatic price increases in the past few years. Home price appreciation generally has increased the values of properties underlying the mortgages in our portfolio. ***A continued reversal of this strong home price appreciation in any of the geographic markets we serve could result in an increase in delinquencies or defaults and a higher level of credit-related losses, which could reduce our earnings***.

App. 3 at 14 (2006 Annual Report) (emphasis added).

As to the risks to its business posed by fluctuations in interest rates, Freddie warned investors that:

> ***Fluctuations in interest rates could negatively impact our reported net interest income, earnings and fair value of net assets.*** . . . Changes in interest rates could reduce our earnings in material amounts, especially if actual conditions turn out to be materially different than our expectations. For example, ***if interest rates rise or fall faster than we expect or the slope of the yield curve changes in ways different than we anticipated, we may incur significant losses***.

App. 2 at 14-15 (2005 Annual Report) (emphasis added).[12]

[12] Freddie Mac provided to investors a similar warning in its 2006 Annual Report. App. 3 at 16.

Similarly, Freddie Mac warned investors that it might need to take a charge to its earnings if it incurred higher credit losses as a result of a decline in housing prices or a change in interest rates:

> ***Higher credit losses could require us to increase our allowance for credit losses through a charge to earnings.*** We face primarily two types of credit risk -- mortgage credit risk and institutional credit risk. . . . [T]here can be no assurances that our risk management strategies will be effective to manage our credit risks or that our credit losses will not be higher than expected. ***Higher credit losses on our guarantees could require us to increase our allowance for credit losses through charges to earnings and other credit exposures could result in financial losses***.

App. 2 at 15 (2005 Annual Report) (emphasis added).[13]

Freddie Mac also cautioned investors that if, among other things, house prices declined, such a decline could adversely affect the adequacy of its regulatory capital:

> Factors that could adversely affect the adequacy of our regulatory capital for future periods include . . . changes in the economic environment, such as large interest-rate or **implied volatility moves or house-price declines** . . . .

App. 2 at 126 (2005 Annual Report) (emphasis added).[14]

In addition, Freddie Mac expressly warned investors regarding the risks to its financial results posed by its obligation to meet its mission through greater participation in the subprime mortgage market:

> ***We are making certain changes to our business to meet HUD's new housing goals and subgoals, which may adversely affect our profitability.*** We are making significant adjustments to our mortgage sourcing and purchase strategies in an effort to meet the housing goals and subgoals made effective in 2005 . . . For example, ***we may have to purchase loans that offer lower expected returns on our investment and increase our exposure to credit losses.*** In addition, our purchases of goal-eligible loans will need to increase as a percentage of total new mortgage purchases, which may cause us to forego other purchase opportunities that we would expect to be more profitable.

App. 2 at 13 (2005 Annual Report) (emphasis added).[15]

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[13] Freddie Mac provided to investors a similar warning in its 2006 Annual Report. App. 3 at 16.
[14] Freddie Mac provided to investors a similar warning in its 2006 Annual Report. App 3 at 12-13.
[15] Freddie Mac provided to investors a similar warning in its 2006 Annual Report. App 3 at 13.

A Steep Rise And Sudden Decline In
Housing Prices Rocked The Financial Industry In Late 2007

From 1997 through 2006, housing prices increased at an "unusually rapid rate," far "more quickly than is customary" nationwide. App. 46 at 6 (Mortgage Bankers Assoc., Housing & Mortgage Markets: An Analysis, Sept. 6, 2005). In fact, home prices nationwide "rose about 85% from 1997 to 2006 adjusted for inflation;" making it the "biggest national housing boom in U.S. history." App. 50 (Emily Freidlander, Yale's Shiller: U.S. Housing Slump May Exceed Great Depression, Wall St. J. Online, Apr. 22, 2008).

Unfortunately, this unusually steep increase in house prices came to a very abrupt end in 2007. See supra p. 2. Even as late as the first half of that year, however, few predicted the extent to which house prices would eventually decline. Indeed, as Reuters reported on April 20, 2007: "U.S. Treasury Secretary Henry Paulson said on Friday the housing market correction appears to be at or near its bottom and that trouble in the subprime mortgage market will not likely spread throughout the economy."[16] Of course, Secretary Paulson did not have the benefit of a crystal ball, and neither did anyone at Freddie Mac.

In 2007, house prices ultimately fell far more sharply than ever before in recorded U.S. history. See supra p. 2. In the third quarter of 2007, and the month of October 2007, in particular, the year-over-year-housing-price-declines nationwide were the largest on record. Id. When home values plummeted, credit tightened severely and loan defaults increased dramatically. Id.

Not surprisingly, as the table below shows, the precipitous decline in house prices and the tight credit market caused massive losses across the entire financial industry, including at the country's largest and most well respected mortgage lenders and investors:

COMPANY	DATE	LOSS	WRITE-DOWN
Citigroup	10/1/2007	$1.9 billion	$1.4 billion
Citigroup	10/15/2007	$2.196 billion	$1.35 billion
Wachovia	10/19/2007	$1.3 billion	

[16] See App. 47 (Treasury's Paulson- Subprime Woes Likely Contained, Reuters Bus. & Fin., Apr. 20, 2007).

COMPANY	DATE	LOSS	WRITE-DOWN
Morgan Stanley	11/7/2007		$3.7 billion
Bank of America	11/13/2007		$247 million
Bear Stearns	11/14/2007		$1.2 billion
Washington Mutual	12/10/2007		$1.6 billion
Morgan Stanley	12/19/2007	$3,588 million, $3.61 per diluted share	$9.4 billion
Bear Stearns	12/20/2007	$854 million, $6.90 per share	$1.9 billion
Citigroup	1/15/2008	$9.83 billion, 1.99 per share	$18.1 billion
Canadian Imperial	1/15/2008		$462 million
Washington Mutual	1/17/2008	$1.87 billion, $2.19 per diluted share	$1.6 billion
Bank of America	1/22/2008	$5.44 billion	$5.28 billion
AMBAC Financial	1/22/2008	$3,255.6 million; $31.85 per share	

See SEC Filings, available at www.sec.gov.[17]

Freddie Mac's Financial Results For The Third Quarter Of 2007

Like other, more diversified, financial institutions, Freddie Mac -- a monoline business focused solely on the home mortgage market -- was also impacted by the decline in house prices and the credit crisis. On November 20, 2007, Freddie Mac announced that it had incurred a GAAP loss of $2 billion for its third quarter of 2007 ("Q3 2007"). App. 38 (Nov. 20, 2007 press release). As Defendant Piszel then explained: "Weakening house prices and deteriorating credit have hurt Freddie Mac's results, as well as those of other participants in the mortgage market." AC ¶ 118. Freddie Mac's stock price dropped approximately 29% that day following its announcement. AC ¶ 119. Shortly after Freddie Mac reported its financial results for Q3 2007, Plaintiff filed its complaint in this Court.

SUMMARY OF ARGUMENT

Plaintiff's claims fall far short of the legal requirements set forth in the PSLRA and Rule 9(b). First, Plaintiff has failed to plead fraud with the requisite particularity, instead resorting to

[17] Citigroup 8-K (Oct. 1, 2007); Citigroup 8-K (Oct. 15, 2007); Wachovia Corp. 8-K (Oct. 19, 2007); Morgan Stanley 8-K (Nov. 7, 2007); Bank of Am. 8-K (Nov. 13, 2007); Bear Stearns 8-K (Nov. 14, 2007); Washington Mutual 8-K (Dec. 10, 2007); Morgan Stanley 8-K (Dec. 19, 2007); Bear Stearns 8-K (Dec. 20, 2007); Citigroup 8-K (Jan. 15, 2008); Canadian Imperial 6-K (Jan. 15, 2008); Washington Mutual 8-K (Jan. 17, 2008); Bank of Am. 8-K (Jan. 22, 2008); AMBAC Fin. 8-K (Jan. 22, 2008).

the very "puzzle-style" pleading that this Court has held to be legally deficient. See infra Part I.A. Second, Plaintiff has also failed to allege specific facts giving rise to a strong inference that any Defendant acted with scienter. See infra Part I.B. Indeed, Plaintiff has failed to allege a single specific fact -- not a single document, meeting, or conversation -- that supports any inference, let alone a strong inference, that any of the myriad statements Plaintiff challenges was knowingly false when made.

In addition, Plaintiff has not, and cannot, allege that any transactions in Freddie Mac stock by the Defendants were unusual or suspicious in timing or amount. In fact, contrary to Plaintiff's numerous mischaracterizations, neither Freddie Mac's CEO, CFO, nor COO sold any Freddie Mac shares during the proposed class period, and the Individual Defendants' Freddie Mac holdings actually declined in value by over **$38 million** from the Class Period high to the day following the close of that period. Third, Plaintiff has failed to plead with particularity how any alleged misrepresentation or omission it has referenced was false or misleading. See infra Part I.C.

As in so many strike suits of this sort, Plaintiff's allegations distort the truth. The crux of Plaintiff's case is its unfounded allegation that Defendants "repeatedly and publicly stated that Freddie Mac had no substantial exposure to or risk of loss from subprime and other nontraditional mortgages." AC ¶ 1. However, that charge is based on: (1) distortions of what the Defendants **actually said**; and (2) a misunderstanding, or deliberate misstatement, of two fundamentally different accounting concepts (i.e., "write downs" and "credit losses").

For instance, Plaintiff alleges that, at an investor conference on September 17, 2007, Defendant Piszel "denied that Freddie Mac would **write down** any of its subprime portfolio -- a denial that was proven to be untrue just two months later." AC ¶ 113 (emphasis added). An examination of what Mr. Piszel **actually said** that day reveals that he did not make any comment whatsoever regarding whether or not "Freddie Mac would **write down** any of its subprime portfolio." Id. (emphasis added). To the contrary, after discussing the fact that the AAA-rated subprime bonds in which Freddie Mac has invested have no CDO exposure and have an average

subordination level of 34%, Mr. Piszel stated: "Due to this protection, we have not yet taken **any meaningful credit losses** on this position, and we do not expect to take any in the future." Id. (emphasis added).

"Meaningful credit losses" -- which is what Mr. Piszel actually referred to in the comment that Plaintiff mischaracterizes -- are **not** "write downs." "Credit losses" and "write downs" are fundamentally different accounting terms. A "write down" of an asset must be taken whenever it is overvalued compared to its market value. See App. 45 (Definition of "Write-Down," Investopedia: A Forbes Digital Co., http://www.investopedia.com/terms/w/writedown.asp (last visited Aug. 1, 2008)). GAAP rules require companies to mark the present value of their assets to the current market value, and they require that assets will be marked down on companies' balance sheets. See App. 3 at 106-07 (2006 Annual Report).

A "credit loss" is a completely different animal. Freddie Mac suffers a "credit loss" only when it actually loses money on a mortgage loan or mortgage backed security that it either holds or has guaranteed.[18] As Mr. Piszel predicted on September 17, 2007 (AC ¶ 113), and contrary to the gross distortions on which this entire case is based, Freddie Mac did **not** report **any credit loss** on any of its AAA-rated bonds backed by subprime loans -- let alone "any meaningful credit losses" -- during the Class Period, and Plaintiff does not, and cannot, allege otherwise.

Even if Plaintiff's claims were not subject to dismissal under the PSLRA and Rule 9(b) -- and they are -- they also fail under Rule 12(b)(6) for several reasons. First, Plaintiff's allegations all relate to accurate statements of historical fact, vague and indefinite statements of optimism, charges of mere mismanagement, and forward-looking statements that were accompanied by meaningful cautionary language, none of which is actionable, as a matter of law, under long-

[18] When an asset is "written down," it does not signify that any actual credit loss has been suffered respecting that asset, or that any such "credit loss" may ever be incurred respecting that asset. See, e.g., App. 51 (Yalman Onaran, Subprime Losses Top $379 Billion on Balance-Sheet Marks: Table, Bloomberg News, May 19, 2008, available at http://www.bloomberg.com/apps/news?pid=20601087&sid=aK4Z6C2kXs3A&refer=home ("The difference between writedown and credit loss: Investment banks and the investment-banking units of financial conglomerates mark their assets to market values, whether they're loans, securities or collateralized debt obligations, and label that a 'writedown' when values decline. Commercial banks take charge-offs on loans that have defaulted and increase reserves for loans they expect to go bad, which they label 'credit losses.'") (emphasis added)).

established principles of federal securities law. See infra Parts II.B, II.A.2. Second, none of the challenged statements is "misleadingly incomplete" -- a prerequisite to a securities fraud claim under governing law. See infra Part II.A.1. Third, much of the allegedly omitted information was, in fact, plainly disclosed in the very documents upon which Plaintiff bases its claims. See infra Part II.A.3.

In the end, the reason that this case should be dismissed is not very complicated. Freddie Mac's principal assets are home mortgages and mortgage-backed securities. As Freddie Mac repeatedly warned investors, a decline in home values was likely to cause Freddie Mac to recognize losses. In November 2007, the steepest decline in home values in U.S. history led Freddie Mac to recognize losses. Failing to predict the precise timing and magnitude of a historically unprecedented drop in housing prices, or its inevitable financial impact on Freddie Mac, is not fraud.

As many courts have recognized:

> [H]indsight does not establish fraud. If it did, any drop in the price of shares would result in lawsuits from disappointed investors. The market has risks; the securities laws do not serve as investment insurance.

Raab v. General Physics Corp., 4 F.3d 286, 291 (4th Cir. 1993) (affirming dismissal of federal securities fraud claims). "Investment insurance" -- to which Plaintiff is not entitled -- is plainly what Plaintiff is looking for here. Id. For all of these reasons, the Amended Complaint should be dismissed in its entirety, with prejudice.

ARGUMENT

I. THE AMENDED COMPLAINT SHOULD BE DISMISSED UNDER THE PSLRA AND RULE 9(b).

Plaintiff does not meet its pleading obligations under the PSLRA and Federal Rule of Civil Procedure 9(b). Plaintiff fails to plead fraud with particularity, fails adequately to plead scienter, and fails to plead any alleged misrepresentations or omissions of material fact, as required by the statute and Rule 9(b).

A. Plaintiff Fails To Plead Fraud With Particularity.

The PSLRA's pleading requirements are strict and rigorous, requiring Plaintiff, inter alia, to "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which the belief is formed." Goodyear, 436 F. Supp. 2d at 904 (citing 15 U.S.C. § 78u-4(b)(1)). The PSLRA further requires that a complaint "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." Id. (citing 15 U.S.C. § 78u-4(b)(2)). Similarly, Federal Rule of Civil Procedure 9(b) requires that a party state "with particularity" the circumstances constituting the alleged fraud. Fed. R. Civ. P. 9(b).

Here, instead of adhering to the exacting pleading standards of the PSLRA and Rule 9(b), the Amended Complaint's structure seems designed to confuse and obscure. For example, Plaintiff includes in the Amended Complaint a laundry list of alleged material omissions that Plaintiff claims Freddie Mac failed to disclose throughout the Class Period. AC ¶¶ 73-78, 153-54. Plaintiff then proceeds to cite to dozens of press releases, conference call transcripts and news articles, alleging that all were materially misleading for failing to disclose the alleged material omissions. AC ¶¶ 79-118, 140-52. Plaintiff, however, fails to explain how any one specific statement was rendered false or misleading through the alleged omission of any information referenced in Paragraphs 73-78 and 153-54. As a result, the Court and Defendants are left to guess as to which of the alleged material omissions rendered which of the press releases, conference calls and financial disclosures false or misleading, and why.

As such, the Amended Complaint is a textbook example of the puzzle-pleading style that this Court held legally defective in Goodyear:

> [T]he Amended Complaint repeatedly refers to a list of alleged improprieties that may or may not have anything to do with the [allegedly misleading] statements. For example, each allegedly false series of statements refers back to a section of the Amended Complaint that contains a laundry list of allegations purporting to pertain to each separate statement. It is Plaintiffs' burden to plead fraud on a statement-by-statement basis and they may not evade that requirement by

> requiring the Court to try to match the allegedly fraudulent statements to the allegations of wrongdoing that are scattered throughout the seventy-plus page Amended Complaint.

436 F. Supp. 2d at 904.

Here, the matching exercise that Plaintiff improperly imposes on the Court would be even more difficult to undertake, as the alleged misrepresentations and omissions "are scattered throughout the [ninety]-plus page Amended Complaint." Id. The volume of Plaintiff's complaint (91 pages and 203 paragraphs) cannot substitute for actual, specific allegations. In re PETsMART, Inc. Sec. Litig., 61 F. Supp. 2d 982, 991 (D. Ariz. 1999) (stating that the PSLRA's "heightened pleading rules are designed to elicit clarity . . . not volume" and dismissing plaintiff's "cumbersome and unhelpful" securities fraud complaint). As the Fifth Circuit noted in rejecting similarly ill-pled claims under Section 10(b) of the Securities Exchange Act of 1934 (the "1934 Act"):

> A complaint can be long-winded, even prolix, without pleading with particularity. Indeed, such a garrulous style is not an uncommon mask for an absence of detail. The amended complaint here, although long, states little with particularity.

Williams v. WMX Techs., Inc., 112 F.3d 175, 178 (5th Cir. 1997); see also In re 2007 NovaStar Fin., Inc. Sec. Litig., No. 07-0139, 2008 U.S. Dist. LEXIS 44166, at *7 (W.D. Mo. June 4, 2008) ("One might be tempted to think that a complaint spanning more that 100 pages and consisting of more than 200 paragraphs could not fail to be specific. The temptation is dangerous and must be resisted."). For this reason alone, all of Plaintiff's claims should be dismissed under the PSLRA and Rule 9(b).

B. Plaintiff Also Fails Adequately To Plead Scienter.

In asserting a claim of securities fraud, a plaintiff must plead specific facts that create a strong inference of scienter; i.e., that the defendant knowingly made a false statement. Here, Plaintiff fails to plead a single specific fact that gives rise to any inference -- let alone the requisite strong inference --- that any Defendant acted with scienter. Rather, Plaintiff asks this Court to infer scienter based solely on allegations relating to trading in the Company's stock and

the Individual Defendants' compensation. These lone allegations of "motive and opportunity" are insufficient as a matter of law.

1. Plaintiff Must Plead Specific Facts Giving Rise To A Strong Inference Of Scienter.

As the Supreme Court recently observed, the "[e]xacting pleading requirements" of the PSLRA impose an obligation on plaintiffs to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." Tellabs, 127 S. Ct. at 2504 (quoting 15 U.S.C. § 78u-4(b)(2)) (emphasis added). A reasonable or plausible inference of scienter is not sufficient to survive dismissal; a complaint must raise an inference that is "**cogent and at least as compelling as any opposing inference one could draw from the facts alleged**." Id. at 2510 (emphasis added).[19]

In attempting to establish scienter, plaintiffs "typically identify internal reports, memoranda or the like and allege both the contents of those documents and defendant's possession of them at the relevant time." In re Boston Tech., Inc. Sec. Litig., 8 F. Supp. 2d 43, 57 (D. Mass. 1998) (granting motion to dismiss securities fraud complaint). Securities fraud complaints that fail to identify such documents or other contemporaneous facts tending to show that the defendants knew the statements in question were false when made are subject to dismissal. See PR Diamonds, 364 F.3d at 692 (affirming grant of motion to dismiss where, inter alia, there were "no specific allegations of a divergence between internal reports and external statements on the same subject"); In re Ferro Corp. Sec. Litig., No. 04-1440, 2007 WL 1691358, at *16 (N.D. Ohio June 11, 2007) (same).

[19] Further, in the Sixth Circuit, "plaintiffs must 'prove that [a] forward-looking statement . . . was made with actual knowledge' to prevail, a formidable burden at the pleading stage." Helwig v. Vencor, Inc., 251 F.3d 540, 554 (6th Cir. 2001) (quoting 15 U.S.C. §78u-5(c)(1)(B)) (emphasis added). In the Sixth Circuit, to plead that a defendant had "actual knowledge" that a predictive, forward-looking statement was false or misleading, a plaintiff must allege specific facts demonstrating that "the speaker does not believe the opinion and the opinion is not factually well grounded." In re Ford Motor Co. Sec. Litig., 381 F.3d 563, 572 (6th Cir. 2004) (citation omitted).

2. Plaintiff Pleads No Specific Facts Giving Rise To A Strong Inference Of Scienter.

Here, this Court can pull a fine-tooth comb through the Amended Complaint and it will not find a reference to **one specific fact** supporting any inference -- let alone a strong inference -- that any Defendant knew that any challenged statement was false when made. The Amended Complaint does not refer to one specific document, meeting, or conversation supporting any inference that **any** Defendant acted with scienter. Accordingly, Plaintiff alleges no specific facts giving rise to a strong inference that any Defendant knowingly made a single false statement during the Class Period.

Instead, Plaintiff relies solely on conclusory allegations regarding what Defendants allegedly knew. As this Court stressed in Ferro, "Plaintiff must plead *facts* giving rise to a strong inference of scienter -- complaints containing conclusory allegations are properly dismissed." 2007 WL 1691358, at *10 (emphasis in original) (citing Helwig v. Vencor, Inc., 251 F.3d 540, 551 (6th Cir. 2001)). Furthermore, as the Sixth Circuit has emphasized, "fraudulent intent cannot be inferred merely from the Individual Defendants' positions in the Company and alleged access to information." PR Diamonds, 364 F.3d at 688; see also Goodyear, 436 F. Supp. 2d at 897 ("The fact that [the Chief Financial Officer and Executive Vice President] held weekly meetings with others in the finance department to discuss problems with the inter-company billing system is not suggestive of scienter. And mere allegations that these intentional overrides were 'widely known' does not cure this deficiency.").

For this reason, Plaintiff gets nowhere with the allegation that the Individual Defendants supposedly received "a monthly report" that "included purchases, loan payoffs, delinquencies and portfolios." AC ¶ 62. Plaintiff fails to allege any specific facts regarding any one report that any Defendant allegedly received, such as the date of any such report, the specific content of any report, or how any information contained in any such report was allegedly inconsistent with any challenged statement. Numerous courts have held such allegations defective as a matter of law.[20]

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[20] See, e.g., In re Silicon Graphics Sec. Litig., 183 F.3d 970, 985 (9th Cir. 1999) (plaintiffs' description of contents of three named reports regularly generated by defendants held insufficient for lack of specific description of

That is because courts give no credence to "must have known" allegations, which by their very nature are unsupported by specific facts actually known by defendants. See Bovee v. Coopers & Lybrand C.P.A., 272 F.3d 356, 361 (6th Cir. 2001) ("Plaintiffs may not simply rely on the proposition that Defendants must have known or should have known of . . . the fraud."); Ferro, 2007 WL 1691358, at *12 ("These types of conclusory "he-must-have-known" allegations are routinely rejected by courts as not evidencing scienter.").

3. Plaintiff's "Motive And Opportunity" Allegations Do Not Support A Strong Inference Of Scienter.

Where a plaintiff fails to plead specific facts supporting a strong inference of scienter, it cannot salvage its claims by simply making "motive and opportunity" allegations. In re Comshare Inc. Sec. Litig., 183 F.3d 542, 551 (6th Cir. 1999) ("[T]he bare pleading of motive and opportunity does not, standing alone, constitute the pleading of a strong inference of scienter."). Here, Plaintiff's "motive and opportunity" allegations, which are based on alleged insider trading and executive compensation, do not support any inference of scienter regarding any challenged statement. Rather, they are wholly inconsistent with any such inference because: (1) the absence of trades by the Company's CEO, CFO, and COO during the Class Period, and the millions of dollars of investment losses the Individual Defendants incurred, undermines any inference of scienter; (2) the fact that the Company itself repurchased in excess of $2.2 billion in Company stock during the Class Period refutes any inference of scienter; (3) only one of the four Individual Defendants traded during the Class Period, and Plaintiff has failed to plead any specific facts showing that this trading was unusual in timing or amount; and (4) Plaintiff's allegations concerning the Individual Defendants' compensation cannot support any inference of scienter.

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content of particular reports); Arazie v. Mullane, 2 F.3d 1456, 1467 (7th Cir. 1993) (holding insufficient to support allegations of fraud "scanty descriptions" of internal documents not augmented by facts showing "who sent the memo, when it was received, or whether it reflected a final determination") (emphasis added); Grillo v. Tempur-Pedic Int'l, Inc., 553 F. Supp. 2d 809, 819 (E.D. Ky. 2008) ("Merely stating that the Defendants had access to and receipt of internal financial reports without any proof of the adverse content of those reports is not a basis for a strong inference of scienter.") (emphasis added).

a. The Absence Of Sales By Freddie Mac's CEO, CFO, And COO, And The Millions Of Dollars Of Investment Losses They Incurred, Undermines Any Inference Of Scienter.

Contrary to Plaintiff's misleading allegations, the Company's Chief Executive Officer, Richard F. Syron, Chief Financial Officer, Anthony Piszel, and Chief Operating Officer, Eugene McQuade sold no stock at all during the Class Period. See App. 39 (Individual Defendant Trading Exhibit and Related Forms).[21] Plaintiff's allegations to the contrary are based on a gross distortion of the very documents on which it relies, i.e., Forms 4 available on Freddie Mac's website. The actual facts undermine any inference of scienter.

Officers of a public company are required to file Forms 4 when they transact in company stock. On the Form 4, they must identify a one-letter "Transaction Code," characterizing the type of transaction at issue. See 15 U.S.C.A. § 78a; see also 17 C.F.R. §§ 240.16a-2, 240.16a-3. For example, an "**S**" refers to an "[o]pen market or private **sale** of non-derivative or derivative security," and a "P" refers to the purchase of such a security. See App. 40 (Freddie Mac's Form 4 General Instructions) (emphasis added). An "**F**" denotes neither a sale nor a purchase, but rather a **forfeiture** of stock. See id. A "forfeiture" of stock is a transaction "solely between the reporting person and the issuer and [does] **not** involve any **sale** of securities in the public markets." See id. (emphasis added); see also United States Securities and Exchange Commission Form 4 General Instructions, http://www.sec.gov/about/forms/form4data.pdf (last visited on September 2, 2008).

As the Forms 4 on which Plaintiff relies plainly indicate, every single "sale" that Plaintiff attributes to Freddie Mac's CEO, CFO, or COO was **not** a **sale**, but a "**forfeiture**." See App. 39 (Individual Defendant Trading Exhibit and Related Forms) (emphasis added). Furthermore, the face of each such Form 4 explains that the designation "F", for "forfeiture", refers to Freddie Mac's automatic retention of stock, rather than to any Defendant's sale of stock on the open

[21] The trading activity of the Individual Defendants is summarized in the chart attached at App. 39, which is supported by the Forms 4 also included at App. 39. See supra n.3.

market. Each designation "F" on each Form 4 is accompanied by an asterisk referencing the following explanatory note:

> *Shares **automatically retained by Freddie Mac** to cover taxes associated with the lapse of restrictions on restricted stock award.

App. 39 (Individual Defendant Trading Exhibit and Related Forms) (emphasis added).

The distinction between a sale and a forfeiture of stock is crucially important because forfeitures -- which are not sales to any other person, and in this case occurred "automatically" -- cannot give rise to any inference of scienter. See South Ferry LP No. 2 v. Killinger, 399 F. Supp. 2d 1121, 1144 (W.D. Wash. 2005) (dismissing securities claims, rejecting allegation that forfeitures gave rise to inference of scienter); see also In re Sportsline.com Sec. Litig., 366 F. Supp. 2d 1159, 1173 (S.D. Fla. 2004) (rejecting allegation that forfeitures of small percentages of holdings gave rise to any inference of scienter, noting: "As shown by the Form 4's filed with the SEC by Defendant Sanders, Defendant Levi, and Mariani, none of them pocketed proceeds, but rather forfeited stock for tax withholding purposes.") (emphasis added). As the Killinger court explained:

> [E]vidence of shares yielded up to the company to pay a payroll tax liability on an option exercise or award of shares, without more, neither enhances nor weakens the inference of scienter. Indeed, generally, the shares used for such a purpose are automatically withheld each time an employee is awarded stock. . . . Thus, **the Court finds that these tax-related withholdings neither give rise to nor support an inference of scienter.**

Killinger, 399 F. Supp. 2d at 1144 (emphasis added).

As the Forms 4 show, the Company's CEO, CFO, and COO collectively held 776,896 shares and exercisable options as of the end of the Class Period -- yet they had **no** "**sales**" during that time.[22] Id. Consequently, the value of Mr. Syron's holdings declined by more than **$18 million** from the Class Period high of $71.23 on November 8, 2006 to the opening of trading on the last day of the Class Period ($26.74 on November 20, 2007). Id. Similarly, the value of Mr.

[22] As courts in the Sixth Circuit have recognized, when assessing total holdings, "it is appropriate to consider both direct holdings and vested stock options." Campbell v. Lexmark Int'l, Inc., 234 F. Supp. 2d 680, 686 n.7 (E.D. Ky. 2002) (citing In re Silicon Graphics, Inc., 183 F.3d 970, 985-86 (9th Cir. 1999)).

Piszel's holdings declined by more than **$5 million**, and the value of Mr. McQuade's holdings declined by more than **$10 million** during that same period. Id.

This absence of stock sales negates any inference of scienter. In re Comshare Sec. Litig., No. 96-73700, 1997 WL 1091468, at *10 (E.D. Mich. Sept. 18, 1997), aff'd on other grounds, 183 F.3d 542 (6th Cir. 1999) ("[T]he **CEO and CFO would have been essential participants in any scheme**, thus, **their having sold no stock undermines any suggestion of knowledge** on the part of defendants due to the other sales.") (emphasis added); see also In re First Union Corp. Sec. Litig., 128 F. Supp. 2d 871, 899 (W.D.N.C. 2001) (fact that "many key First Union executives . . . -- including the Company's Chief Financial Officer -- did not sell a single share . . . is fatal to Plaintiff's effort to establish scienter through stock sales"); In re Credit Acceptance Corp. Sec. Litig., 50 F. Supp. 2d 662, 677 (E.D. Mich. 1999) ("The fact that [the CFO] did not sell any shares during the class period undermines the suggestion that the Defendants engaged in securities fraud").

Furthermore, this is not merely a case where senior management did not sell shares; here, Messrs. Syron, Piszel and McQuade collectively suffered investment losses of over **$34 million** on their Freddie Mac holdings during the Class Period. See App. 39 (Insider Trading Exhibit and Related Forms). Ms. Cook also suffered investment losses exceeding **$4 million**. See id. Where, as here, defendants have suffered enormous investment losses, courts have found it implausible that such defendants possessed any intent to defraud. See, e.g., Maldonado v. Dominguez, 137 F.3d 1, 12 n.10 (1st Cir. 1998) (noting that any inference of scienter was undermined by defendants' personal loss of $1.5 million); Campbell v. Lexmark Int'l, Inc., 234 F. Supp. 2d 680, 686 (E.D. Ky. 2002) (fact that retained holdings subjected defendants to substantial losses tended to undermine any inference of scienter). Plaintiff's stock trading allegations, far from supporting a **strong** inference of scienter, defeat their fraud claims. See Coates v. Heartland Wireless Commc'ns Inc., 26 F. Supp. 2d 910, 920 (N.D. Tex. 1998) (dismissing securities fraud claim in part because "the notion that [the defendant] would engage

in fraud and then wait for the stock price to plummet before selling his securities without benefiting from the fraud is a 'nonsensical premise'").

b. Freddie Mac's Repurchase Of Over $2.2 Billion Of Its Own Shares Refutes Any Inference Of Scienter.

Plaintiff alleges that the Company's "$1 billion program of buying back" its own stock supports an inference of scienter. AC ¶ 139(e)(i). To the contrary, courts have held that a defendant company's repurchase of its own shares through a stock buyback program **refutes** any inference of scienter. See, e.g., In re Tibco Software, Inc. Sec. Litig., No. 05-2146, 2006 WL 1469654, at *21 (N.D. Cal. May 25, 2006) ("[S]tock repurchase programs actually *negate* a finding of scienter.") (emphasis in original); Morse v. McWhorter, 200 F. Supp. 2d 853, 898 (M.D. Tenn. 2000) (holding that company's $1 billion stock repurchase plan "undermines an inference of scienter because it presumably would make 'no sense to purchase that stock if defendants knew the prices to be inflated.'") (internal citation omitted); Oppenheimer v. Novell, Inc., 851 F. Supp. 412, 417 (D. Utah 1994) (recognizing that stock buy-back program is inconsistent with allegation that company was inflating price of its stock).

During the Class Period, Freddie Mac purchased over 36 million shares of its common stock pursuant to board-authorized repurchase programs, at a total cost of at least **$2.2 billion**. See App. 3 at 19 (2006 Annual Report); App. 5 at 72 (2007 Annual Report). Further, Freddie Mac's "$1 billion program of buying back" its own stock was in no way suspicious or unusual. In October 2005 -- almost a year before the beginning of the Class Period -- Freddie Mac announced a $2 billion stock buyback initiative. See App. 3 at 19 n.1 (2006 Annual Report). These stock buybacks evidence that Freddie Mac believed its stock was **undervalued, not overvalued**. Thus, Plaintiff's allegations regarding Freddie Mac's stock repurchase program "actually *negate* a finding of scienter." Tibco, 2006 WL 1469654, at *21 (citation omitted).

c. Ms. Cook's Sales Do Not Give Rise To Any Inference Of Scienter.

Contrary to Plaintiff's misleading allegations, **only one** of the four Individual Defendants -- Patricia Cook -- sold any shares during the Class Period, and her two sales were both non-actionable under Rule 10b5-1.[23] In fact, six out of the eight "sales" that Plaintiff attributes to Ms. Cook during the Class Period were actually "forfeitures," not "sales."[24] As set forth above, a forfeiture is not a sale, and it cannot give rise to any inference of scienter, as a matter of law. See supra Part I.B.3.a. The two small actual sales likewise cannot support any inference of scienter as they were made pursuant to a Rule 10b5-1 trading plan. See App. 39 (Individual Defendant Trading Exhibit and Related Forms); Howard v. Everex Sys., 228 F.3d 1057, 1066 (9th Cir. 2000) ("the [insider] sales could not support a finding of scienter as a matter of law because they were made pursuant to a divestiture program"); In re Guidant Corp. Sec. Litig., 536 F. Supp. 2d 913, 931 (S.D. Ind. 2008) (automatic, nondiscretionary sales made pursuant to 10b5-1 plans do not give rise to a strong inference of scienter); In re Netflix, Inc., Sec. Litig., No. 04-2978, 2005 WL 1562858, at *8 (N.D. Cal. June 28, 2005) (no strong inference of scienter where defendants' sales were pursuant to a Rule 10b5-1 plan).

Ms. Cook's two Rule 10b5-1 sales cannot support any inference of scienter for other reasons as well. First, as this Court has recognized, stock trading by insiders, standing alone, is not probative of scienter. See, e.g., Ferro, 2007 WL 1691358, at *14.[25] Trading by insiders may give rise to an inference of scienter only if, among other things, the plaintiff adequately pleads that the trading is "suspicious" -- i.e., unusual in amount in light of prior trading history and near in time to the "bad news" being disseminated. PR Diamonds, 364 F.3d at 682; Ferro, 2007 WL

[23] Moreover, where, as here, only one of the individual defendants actually traded company stock during the period at issue, there is no strong inference of scienter. See, e.g., Nathenson v. Zonagen Inc., 267 F.3d 400, 420-21 (5th Cir. 2001) (no strong inference of scienter where only one out of three insider defendants sold corporate stock); In re John Alden Fin. Corp. Sec. Litig., 249 F. Supp. 2d 1273, 1282 (S.D. Fla. 2003) (insider trading allegations inadequate where only one of four individual defendants sold stock during the class period).

[24] Contrary to Plaintiff's unsupported allegations, see AC ¶ 164, Ms. Cook forfeited shares on August 2, 2006, May 6, 2007, June 5, 2007 and August 2, 2007, and did not "sell" shares on these dates or on January 31, 2007. See App. 39 (Insider Trading Exhibit and Related Forms).

[25] See also In re Alpharma, Inc. Sec. Litig., 372 F.3d 137, 152 (3d Cir. 2004) ("A large number of today's corporate executives are compensated in terms of stock and stock options. . . . [and] [i]t follows . . . that these individuals will trade those securities in the normal course of events.") (quotations omitted) (citation omitted).

1691358, at *15 (insider trading allegations held not to support strong inference of scienter absent specific facts showing whether trading was "out of line and excessive, or . . . typical and routine."). Plaintiff has failed to meet that burden here.

Second, Ms. Cook sold only approximately **6%** of the total shares and options that she owned during the Class Period. See App. 39 (Individual Defendant Trading Exhibit and Related Forms). As a result, the value of Ms. Cook's retained holdings declined by over **$4 million** from the Class Period high of $71.23 on November 8, 2006 to the opening of trading on the last day of the Class Period ($26.74 on November 20, 2007). The substantial **devaluation** of her holdings in Freddie Mac during the Class Period render it even more implausible that Ms. Cook possessed an intent to defraud. See supra p. 21.

Third, the temporal relationship of Ms. Cook's trades and Freddie Mac's November 20, 2007 disclosure negates any inference of scienter. Ms. Cook did not engage in **any** trades immediately before the November 20, 2007 disclosure. Her only trades were on January 3, 2007 -- more than **ten months** prior to the November 20, 2007 disclosure. See App. 39 (Insider Trading Exhibit and Related Forms). As courts have observed, "[a] broad temporal distance between stock sales and disclosure of bad news defeats any inference of scienter." In re Party City Sec. Litig., 147 F. Supp. 2d 282, 313 (D.N.J. 2001); see also In re Nike, Inc. Sec. Litig., 181 F. Supp. 2d 1160, 1169 (D. Or. 2002) (one-month gap between sales and adverse disclosure negates scienter).

For these many reasons, the Plaintiff's trading allegations do not support any inference, let alone a strong inference, of scienter, as a matter of law.

d. Plaintiff's Allegations Concerning The Individual Defendants' Compensation Cannot Support Any Inference of Scienter.

Plaintiff also attempts to raise an inference of scienter by pointing to the incentive-based bonuses and stock awards received by the Individual Defendants, alleging, inter alia, that "[e]ach Individual Defendant received significant compensation including a program of bonuses when Freddie Mac reached certain financial earnings targets." AC ¶¶ 155-67. However, numerous

courts, including the Sixth Circuit and this Court, have held that this type of motive allegation -- merely asserting that a defendant's compensation is tied to earnings -- is insufficient to raise a strong inference of scienter. See, e.g., PR Diamonds, 364 F.3d at 690 ("All corporate managers share a desire for their companies to appear successful. That desire does not comprise a motive for fraud. Neither does an executive's desire to protect his position within a company or increase his compensation.") (citations omitted); Novak v. Kasacs, 216 F. 3d 300, 307 (2d Cir. 2000) ("Plaintiff could not proceed based on motives possessed by virtually all corporate insiders, including . . . the desire to maintain a high stock price in order to increase executive compensation."); Ferro, 2007 WL 1691358, at *18 (finding that defendants' compensation packages did not support an inference of scienter and stating: "Furthermore, Plaintiff has again pleaded no specific facts regarding Defendants' compensation packages and makes reference to the bare numbers with the hope that the mere fact that Defendants received compensation will be enough for the Court to make a finding of scienter."); Goodyear, 436 F. Supp. 2d at 899 ("[I]t does not suffice to allege that Defendants possessed self-interested motivation in saving their salaries or jobs.").

Here too, Plaintiff has failed to plead specific facts regarding the Individual Defendants' compensation. Instead, Plaintiff relies on bare numbers with the misguided hope that the Court, contrary to its own precedent and controlling Sixth Circuit authority, will find the requisite strong inference of scienter simply because the Defendants were compensated for their work.

* * *

In sum, Plaintiff has failed to allege specific facts giving rise to a strong inference that any Defendant acted with scienter. Under this Court's decision in Goodyear, the Amended Complaint should be dismissed for this reason alone. In Goodyear, where the defendant company restated its financial results, this Court observed: "In hindsight, it is clear that the statements on which Plaintiffs rely were not true, but the Court's duty is to determine whether the pleadings sufficiently allege scienter." 436 F. Supp. 2d at 903. Finding that they did not, this Court granted defendants' motions to dismiss, with prejudice. Here, Plaintiff has not even

adequately pled that any challenged statement was false. See infra Part I.C. Even if Plaintiff had done so, however, its claims would fail -- as in Goodyear -- because Plaintiff has failed sufficiently to plead scienter. See also Denny v. Barber, 576 F.2d 465, 470 (2d Cir. 1978) ("[F]ailure to [have greater clairvoyance] does not constitute fraud."); NovaStar, 2008 U.S. Dist. LEXIS 44166, at *10 ("[T]he PSLRA's effort to combat claims of 'fraud by hindsight' demonstrates a reluctance to countenance claims that attach heightened importance to facts only when looking back at the aftermath of misfortune."). Thus, as in Goodyear, all of Plaintiff's claims should be dismissed with prejudice, for failure adequately to allege scienter.

C. The Alleged Misrepresentations And Omissions Are Not Pled With The Particularity Required By The PSLRA And Rule 9(b).

As this Court has stated, in cases alleging securities fraud, the pleading standards are more "vigorous" than the usual pleading standard in federal courts. See Ferro, 2007 WL 1691358, at *9. To satisfy the heightened pleading requirements, "a plaintiff must detail specifically the facts and circumstances it claims constitute the defendant's fraudulent conduct." Goodyear, 436 F. Supp. 2d at 890 (citation omitted). Furthermore, the Sixth Circuit has observed:

> Adding to the Federal Rule of Civil Procedure 9(b) requirement that fraud allegations be stated with particularity, the PSLRA mandates that the complaint "**specify each statement** alleged to have been misleading, **the reason or reasons why** the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall **state with particularity all facts on which that belief is formed**."

Ford Motor Co., 381 F.3d at 567 (quoting 15 U.S.C. § 78u-4(b)(1)) (emphasis added). Given this law, "'claims of securities fraud cannot rest on speculation and conclusory allegations.'" Goodyear, 436 F. Supp. 2d at 897 (quoting PR Diamonds, 364 F.3d at 692).

In addition, allegations that "are not based upon [a Plaintiff's] personal knowledge . . . are . . . necessarily pleaded on 'information and belief,' although not labeled as such." ABC Arbitrage Plaintiff Group v. Tchuruk, 291 F.3d 336, 351 (5th Cir. 2002). Accordingly, Plaintiff is required to set forth with particularity the sources of its information and the reasons for its

beliefs. See Ferro, 2007 WL 1691358, at *9 ("plaintiff [must] state with particularity all facts supporting an allegation made on information and belief"). Even under Rule 12(b)(6), plaintiffs must allege more than mere speculation to survive a motion to dismiss. See Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 (2007). Under the PSLRA and Rule 9(b), they must allege far more -- they must plead fraud with particularity, including a specification of each statement that is allegedly false or misleading, an explanation as to why that statement is believed to be false or misleading, and a recitation of specific facts supporting that belief. Here, Plaintiff has failed to allege any specific facts explaining how any challenged statement was false when made.

Plaintiff's reliance on "confidential witness" allegations does not cure the defects in the Amended Complaint. See AC ¶¶ 40-44, 46-47, 51-52, 57, 62, 64-66, 69, 71, 129-31. As courts recently have held, confidential witness allegations should be discounted. See, e.g., Higginbotham v. Baxter Int'l. Inc., 495 F.3d 753, 757 (7th Cir. 2007) (stating that, under Tellabs, "allegations for 'confidential witnesses' must be 'discounted' rather than ignored [but] [u]sually that discount will be steep."); see also Ferro, 2007 WL 1691358, at *12 (discounting confidential witness allegation where they "amount to no more than blatant speculation regarding what Defendants . . . should have/could have/would have known regarding the alleged fraud").[26]

In addition, where a plaintiff is relying upon "confidential witnesses," the allegations must provide details sufficient to support the notion that a person in the position of the confidential witness would possess the information alleged. See, e.g., In re Am. Bus. Fin. Servs., 413 F. Supp. 2d 378, 390 (E.D. Pa. 2005) (granting motion to dismiss where plaintiffs failed to provided sufficient information to establish that confidential witnesses were in a position to possess the information alleged). Plaintiff utterly fails to meet these fundamental pleading

[26] See also Indiana State Dist. Council of Laborers v. Omnicare, Inc., 527 F. Supp. 2d 698, 710 (E.D. Ky. 2007) (dismissing securities fraud complaint based in part on plaintiff's failure to allege sufficient detail supporting the probability that confidential witnesses would have known relevant information regarding defendants' actions); In re Keithley Instruments, 268 F. Supp. 2d 887, 904-05 (N.D. Ohio 2002) (dismissing securities fraud complaint based in part on anecdotal allegations of confidential witnesses).

requirements. For example, Employee A and Employee J, two ostensible witnesses referenced by Plaintiff, departed Freddie Mac **before** the beginning of the Class Period. See AC ¶¶ 40, 129. Such confidential witnesses obviously cannot support any allegation that a statement made after the termination of their employment was false, let alone knowingly false. See In re Gander Mt. Co., No. 05-183, 2006 WL 140670, at *10 (D. Minn. Jan. 17, 2006) (finding two confidential witnesses who terminated their employment with the defendant company before the start of the class period unreliable); City of Austin Police Ret. Sys. v. ITT Educ. Serv., Inc., 388 F. Supp. 2d 932, 942 (S.D. Ind. 2005) (plaintiffs "fail to establish that the [confidential] witnesses were employed during the class period or . . . had personal knowledge of the facts they reported").

Furthermore, and not surprisingly, not one of the confidential witnesses is alleged to have had any communications with the Individual Defendants. See Zack v. Allied Waste Indus., No. 04-1640, 2005 WL 3501414, at *7 (D. Ariz. Dec. 15, 2005) ("Notably, the Amended Complaint does not allege CW1 personally received directives from named Defendants"). At bottom, Plaintiff's confidential witnesses offer only what amounts to "water-cooler gossip, irrelevant speculation, and gratuitous criticism." Ferro, 2007 WL 1691358, at *12. Such conclusory allegations are insufficient to satisfy the strict pleading requirements of the PSRLA and Rule 9(b), and they do not support any inference of scienter against any Defendant.

For all of these reasons, Plaintiff's claims should be dismissed under the PSLRA and Rule 9(b).

II. THE AMENDED COMPLAINT SHOULD ALSO BE DISMISSED UNDER RULE 12(b)(6) BECAUSE THE PLAINTIFF HAS FAILED TO ALLEGE ANY ACTIONABLE MISREPRESENTATIONS OR OMISSIONS OF MATERIAL FACT.

Even if Plaintiff's claims were not subject to dismissal under the PSLRA and Rule 9(b) -- and they are -- they also fail under Rule 12(b)(6). Recently, in Twombly, 127 S.Ct. at 1965, 1974, the Supreme Court clarified the pleading standard applicable on a motion under Rule 12. A complaint must have more than "labels and conclusions," and "[f]actual allegations must be enough to raise a right to relief above the speculative level." Twombly, 127 S. Ct. at 1964-65.

In other words, a plaintiff's "'plain statement' [must] possess enough heft to show the pleader is entitled to relief." Twombly, 127 S. Ct. at 1966. Here, Plaintiff fails to plead the elements of its ostensible claims. Plaintiff has not alleged any omission of material fact actionable under Section 10(b) (see infra Part II.A) and the statements that Plaintiff contends are materially false or misleading are likewise not actionable under Section 10(b). See infra Part II.B.

A. Plaintiff Has Not Alleged Any Omission Of Material Fact Actionable Under Section 10(b).

It is well settled that, "[s]ilence, absent a duty to disclose, is not misleading under Rule 10b-5." Basic, Inc. v. Levinson, 485 U.S. 224, 239 n.17 (1988). "Before liability for non-disclosure can attach, the defendant must have violated an affirmative duty of disclosure." Murphy v. Sofamor Danek Group, Inc., 123 F.3d 394, 400 (6th Cir. 1997) (emphasis added) (citing Basic, 485 U.S. at 239 n.17). Materiality alone is not sufficient to place a company under a duty of disclosure. See Zaluski v. United Am. Healthcare Corp., 527 F.3d 564, 572 (6th Cir. 2008); Sofamor Danek, 123 F.3d at 400. To hold otherwise would, "deluge investors with marginally useful information, and would damage corporations' legitimate needs to keep some information nonpublic." Zaluski, 527 F.3d at 572; Sofamor Danek, 123 F.3d at 403; see also Gallagher v. Abbott Labs., 269 F.3d 806, 808 (7th Cir. 2001) ("We do not have a system of continuous disclosure. Instead firms are entitled to keep silent (about good news as well as bad news) unless positive law creates a duty to disclose.").[27]

Freddie Mac had no duty to disclose the allegedly omitted information. As explained below: (1) Plaintiff does not and cannot allege that any actual statement was "so incomplete as to mislead"; (2) Plaintiff's allegations of business mismanagement do not state a claim for

[27] In the Sixth Circuit, courts distinguish "hard information" -- "typically historical information or other factual information that is objectively verifiable" -- from "soft information" -- "predictions and matters of opinions." Zaluski, 527 F.3d at 572; Sofamor Danek, 123 F.3d at 402. No duty exists to disclose soft information unless it is "virtually as certain as hard facts." Id. Like most matters of opinion, any predictions that are not "substantially certain to hold" do not come within the duty of disclosure. Sofamor Danek, 123 F.3d at 402 (quotations omitted) (citations omitted).

violation of the federal securities laws; and (3) Defendants in fact disclosed much of the allegedly omitted information.

1. Plaintiff Does Not And Cannot Allege That Any Actual Statement Was "So Incomplete As To Mislead".

A statement that is allegedly "so incomplete as to mislead" is only actionable under very narrow circumstances. See Backman v. Polaroid Corp., 910 F.2d 10, 16 (1st Cir. 1990) (finding that "complete and accurate" disclosure "does not mean that by revealing one fact about a product, one must reveal all others that, too, would be interesting, market-wise, but means only such others, if any, that are needed so that what was revealed would not be 'so incomplete as to mislead.'"); Winer Family Trust v. Queen, 503 F.3d 319, 330 (3d Cir. 2007) (applying Polaroid in affirming dismissal of securities fraud claims); In re K-tel Int'l, Inc. Sec. Litig., 300 F.3d 881, 897-98 (8th Cir. 2002) (same); Oran v. Stafford, 226 F.3d 275, 285-87 (3d Cir. 2000) (same); In re Worlds of Wonder Sec. Litig., 35 F.3d 1407, 1419 (9th Cir. 1994) (same); Glazer v. Formica Corp., 964 F.2d 149, 156 (2d Cir. 1992) (same).

The First Circuit's en banc ruling in Backman illustrates how very narrowly the courts construe what it means for a statement to be "so incomplete as to mislead." 910 F.2d at 16. In Backman, the plaintiffs alleged, inter alia, that certain of Polaroid's disclosures concerning the sales price and number of sales of its Polavision instant movie camera (which ultimately proved to be a commercial disaster) were misleadingly incomplete in violation of the federal securities laws. Id.

In its ruling, the First Circuit stressed that "complete and accurate" disclosure does not require that a company publish every fact about every subject it voluntarily discloses: "This does not mean that by revealing one fact about a product, one must reveal all others that, too, would be interesting, market-wise, but means only such others, if any, that are needed so that what was revealed would not be 'so incomplete as to mislead.'" Id. Applying this principle to the plaintiff's allegations, the court found that Polaroid was not required to disclose other, related information regarding sales and pricing: "Disclosing that Polavision was being sold below cost

was not misleading by reason of not saying how much below. Nor was it misleading not to report the number of sales, or that they were below expectations." Id. (emphasis added).

Just as in Polaroid, Plaintiff's conclusory allegations here fail to indicate how any of the alleged statements were "so incomplete as to mislead." As discussed above, nowhere does Plaintiff allege how any challenged statement was ostensibly misleading by virtue of any alleged omission, instead leaving it to the Court and Defendants to guess at Plaintiff's contentions. As this Court has already explained in two similar cases, this brand of pleading securities fraud does not pass muster under the PSLRA and Rule 9(b):

> The PSLRA . . . requires that a plaintiff **specify each statement that is allegedly false** and **give a particular reason why that statement is false**. A cursory review of the [complaint] demonstrates that Plaintiff does not specify each statement that is allegedly false or give a particular reason why the statement is false. Plaintiff has simply compiled several series of statements (each of which contains multiple statements and long block quotes) and then pairs each series of statements up against what is essentially the same **conclusory list of omissions**.

Ferro, 2007 WL 1691358, at *19 (dismissing with prejudice securities fraud class action); see also Goodyear, 436 F. Supp. 2d at 904 (plaintiffs may not evade the requirement that they "plead fraud on a statement-by-statement" by "requiring the Court to try to match the allegedly fraudulent statements to the allegations of wrongdoing that are scattered throughout the seventy-plus page Amended Complaint").

Plaintiff's allegations here are even less detailed than the fatally defective allegations pled by the plaintiffs in Ferro and Goodyear. Indeed, Plaintiff even fails sufficiently to allege which statements were misleadingly incomplete, let alone why. Plaintiff has not alleged any omission of material fact that is actionable under Section 10(b).

2. Allegations Of Business Mismanagement Do Not State A Claim For Violation Of The Federal Securities Laws.

Many of the omissions the Plaintiff alleges are also not actionable because they amount to no more than claims of supposed corporate mismanagement. Such allegations cannot support a federal securities law claim, as a matter of law. See Santa Fe Indus. v. Green, 430 U.S. 462,

479 (1977) ("Congress by § 10(b) did not seek to regulate transactions which constitute no more than internal corporate mismanagement.") (quotations and citations omitted); In re Citigroup, Inc. Sec. Litig., 330 F. Supp. 2d 367, 375-76 (S.D.N.Y. 2004) (dismissing allegations that defendants failed to adhere to risk management policies as corporate mismanagement claims, not actionable as securities fraud); Sogevalor, SA v. Penn Cent. Corp., 771 F. Supp. 890, 894 (S.D. Ohio 1991) ("[i]t is well-settled that the federal securities laws may not be used to redress . . . claims of corporate mismanagement and other breaches of fiduciary duty.").

Indeed, courts have recently granted motions to dismiss securities fraud claims founded on allegations of corporate mismanagement that are strikingly similar to the allegations in the Amended Complaint. See, e.g., NovaStar, 2008 U.S. Dist. LEXIS 44166, at *13 (dismissing, with prejudice, complaint alleging fraud in connection with defendant's investment in subprime loans and noting: "Plaintiff's Complaint reads more like a cautionary tale from a treatise on business management than a charge of knowing misstatements and concealments. Plaintiff has not stated a claim because companies (and their management) are not expected to be clairvoyant, and bad decisions do not constitute securities fraud."); In re Impac Mortgage Holdings, Inc. Sec. Litig., 554 F. Supp. 2d 1083, 1087 (C.D. Cal. 2008) (granting motion to dismiss securities fraud class action where, inter alia, plaintiffs' allegations "at most" amounted to corporate mismanagement that is "not actionable fraud under the securities laws"); Tripp v. IndyMac Fin. Inc., No. 07-1635, 2007 WL 4591930, at *3-4 (C.D. Cal. Nov. 29, 2007) (allegations that defendant inappropriately loosened underwriting guidelines amounted only to corporate mismanagement and increases in loss reserves indicated only that "Defendants were simply unable to shield themselves as effectively as they anticipated from the drastic change in the housing and mortgage markets").

As these cases illustrate, Plaintiff's allegations with respect to the following subjects cannot support a federal securities law claim, because they amount to no more than non-actionable charges of supposed mismanagement:

- Freddie Mac's publicly disclosed decision to increase its purchase of subprime and non-traditional mortgage products allegedly through its implementation of the "Touch More Loans" and "Whole Loan REMIC" initiatives (AC ¶¶ 34-40, 53-54);
- Alleged deficiencies in Freddie Mac's due diligence capabilities surrounding its evaluation of loans (AC ¶¶ 41-45);
- Alleged decisions by Freddie Mac to waive material exceptions to certain of its (unspecified) underwriting guidelines (AC ¶¶ 41-45);
- Alleged purchases by Freddie Mac of an unspecified number of loans that were subject to inflated appraisals (AC ¶¶ 46-48);
- Alleged practices that supposedly led to Freddie Mac's purchase of a greater percentage of loans with a loan-to-value ("LTV") ratio above 80% (AC ¶¶ 46-49);
- Alleged failures by Freddie Mac to comply with certain of its own (unspecified) underwriting standards (AC ¶ 50);
- Freddie Mac's decision to purchase certain loans originated by Countrywide and Washington Mutual (AC ¶¶ 51-52);
- Alleged deficiencies in Freddie Mac's Quantum computer software system (AC ¶¶ 55-58); and
- Alleged deficiencies in Freddie Mac's fraud detection systems and a supposed failure to implement a product offered by CoreLogic. (AC ¶¶ 64-72, 121).

In addition to its broad, legally deficient allegations of mismanagement, Plaintiff also engages in blatant misrepresentation of statements allegedly made by Freddie Mac. For example, Plaintiff alleges that, during the Class Period, Freddie Mac purchased an unspecified number of loans that "did not satisfy Freddie Mac's lending standards." AC ¶ 45. Plaintiff claims:

> According to an article published in the New York Times on January 27, 2008, the large number of exceptions [to Freddie Mac's lending standards] was not disclosed to ratings agencies such as Moody's and Fitch, who gave many of these pools AAA ratings. Had the extent of the exceptions been disclosed to the ratings agencies, the ratings agencies would not have given the pools such high ratings.

<u>Id.</u>; <u>see also</u> AC ¶ 63.

The extent to which Plaintiff has mischaracterized the document on which it relies is indefensible. The New York Times article that Plaintiff cites -- the sole support for these allegations -- provides no basis for Plaintiff's charges: None. The referenced article <u>**makes no mention whatsoever**</u> of any alleged lending practices at Freddie Mac or any disclosures or lack

of disclosures to ratings agencies by Freddie Mac. See App. 48 (Gretchen Morgenson, O Wise Bank, What Do We Do? (No Fibbing Now), N.Y. Times, Jan. 27, 2008).

Furthermore, Plaintiff's unsupported allegations make no sense. Plaintiff does not, and cannot, allege that ratings agencies, such as Moody's or Fitch, base any ratings they issue on statements allegedly made by Freddie Mac. On the contrary, as the full text of the New York Times article makes plain, Freddie Mac is a **purchaser**, not an issuer, of the securities referenced in that article, i.e., AAA-rated subprime bonds like those that Plaintiff refers to in the Complaint. See, e.g., AC ¶¶ 45, 63. Freddie Mac did not generate, but rather relied on the ratings set by the agencies for those bonds. See App. 48. Plaintiff's allegations run directly counter to the facts discussed in the New York Times article that they distort.[28] In sum, none of Plaintiff's allegations regarding supposed mismanagement at Freddie Mac can support any of their claims in this action.

3. Defendants Disclosed Much Of The Allegedly Omitted Information.

Plaintiff's omission allegations suffer from yet another defect, which independently dictates the dismissal of the vast majority of Plaintiff's omission claims. Where a plaintiff's claims are based on the alleged omission of information that was, in fact, disclosed, such claims are ripe for dismissal. See, e.g., Olkey v. Hyperion 1999 Term Trust, Inc., 98 F.3d 2, 5 (2d Cir. 1996) ("The prospectuses warn investors of exactly the risk the plaintiffs claim was not disclosed."); In re Capstead Mortgage Corp. Sec. Litig., 258 F. Supp. 2d 533, 555 (N.D. Tex. 2003) (dismissing securities fraud claims where company's public filings "adequately warned investors of exactly the risks Plaintiffs contend were not disclosed"). An examination of the alleged omissions, see, e.g., AC ¶¶ 73-77, 153-54, along with Freddie Mac's relevant

[28] Freddie Mac is mentioned in only one sentence of the article, which notes that that Fannie Mae and Freddie Mac may face losses on certain bonds that they had previously purchased. See App. 48 (Gretchen Morgenson, O Wise Bank, What Do We Do? (No Fibbing Now), N.Y. Times, Jan. 27, 2008).

disclosures, reveals that Freddie Mac broadly disclosed to investors much of the allegedly omitted information.[29]

a. Freddie Mac Broadly Disclosed Its Investment In Subprime And Nontraditional Mortgages.

The crux of Plaintiff's case, which it asserts in the first paragraph of its Amended Complaint and repeats in various forms thereafter, is that: "Throughout the Class Period, defined below, Defendants continually, repeatedly and publicly stated that Freddie Mac had no substantial exposure to or risk of loss from subprime or nontraditional mortgages." AC ¶ 1. This allegation is belied by the very documents on which Plaintiff seeks to premise its claims. Both before and throughout the Class Period, Freddie Mac plainly disclosed to investors that, consistent with its mission, it planned to, and did, increase its participation in the subprime and nontraditional mortgage markets.

For example, in its 2005 Annual Report, Freddie Mac stated:

- **The dramatic increases in housing prices over the last few years have resulted in the origination of a greater proportion of alternative mortgage products, including initial interest-only loans and option adjustable-rate mortgage loans, or Option ARMs.** We have historically purchased limited amounts of these alternative products through our securitization programs. **However, recently we have increased our purchases of these products consistent with the increase in their prevalence in the market.** We are continuing to explore ways in which we can become more involved with these products and **we expect our participation in these products to grow over the coming years.** App. 2 at 3 (2005 Annual Report) (emphasis added).

Freddie Mac also provided hard facts concerning its participation in this sector of the mortgage industry:

- **Our purchases of interest-only and Option ARM mortgage products increased in 2005, representing approximately 11 percent of our Total mortgage portfolio purchases as compared to 2 percent in 2004, and we expect this trend to continue in 2006.** App. 2 at 65 (2005 Annual Report) (emphasis added).

Further, it disclosed:

[29] Defendants do not argue that Freddie Mac disclosed all of the allegedly omitted information because some of the allegedly omitted "facts" are not facts at all, but rather just conclusory assertions, unsupported by the particularized pleading necessary to survive a motion to dismiss. See infra Part I.C.

- **We participate in the subprime market segment primarily in two ways.** First, our Retained portfolio makes investments in non-Freddie Mac mortgage-related securities that were originated in this market segment. Substantially all of these securities were rated "AAA" by one or more rating agencies at the time of purchase. Second, we guarantee securities backed by subprime mortgages, which comprise a portion of the "alternative collateral deals" we purchase. . . . **At December 31, 2005 and 2004, we guaranteed $2.3 billion and $4.5 billion of securities backed by subprime mortgages which constituted less than one percent of our Total mortgage portfolio, respectively**. In addition to the non-Freddie Mac mortgage-related securities discussed above, **we make investments through our Retained portfolio in some of the Structured Securities we issue with underlying collateral that is subprime**. The distribution of the single-family loans underlying our Total mortgage portfolio by original and estimated current loan-to-value ratio, credit scores, loan purpose, property type and occupancy type is shown in Table 37. App. 2 at 66 (2005 Annual Report) (emphasis added).

Similarly, in the 2006 Annual Report, Freddie Mac again disclosed its increased participation in the subprime and other nontraditional mortgage markets:

- To improve our ability to fulfill our mission, **we have increased our participation in nontraditional mortgage market products**. App. 3 at 68 (2006 Annual Report) (emphasis added).

In addition, Freddie Mac provided to the market hard facts regarding that participation, including the approximate amount of securities backed by subprime mortgages in its credit guarantee portfolio and its Retained Portfolio:

- [I]ncluded in our credit guarantee portfolio are Structured Securities backed by non-agency mortgage-related securities **where the underlying collateral was identified as being subprime by the original issuer**. At December 31, 2006 and 2005, the Structured Securities **backed by subprime mortgages constituted approximately 0.1 percent and 0.2 percent**, respectively of our credit guarantee portfolio. App. 3 at 69 (2006 Annual Report) (emphasis added).
- With respect to our Retained portfolio, we do not believe that any meaningful amount of the agency securities we hold is backed by subprime mortgages. **However, at December 31, 2006 and 2005, we held approximately $124 billion and $139 billion, respectively, of non-agency mortgage-related securities backed by subprime loans.** These securities include significant credit enhancement based on their structure and more than 99.9 percent of these securities were rated AAA at December 31, 2006. App. 3 at 69 (2006 Annual Report) (emphasis added).

See also App. 3 at 68-69 (2006 Annual Report) (discussing the Company's expansion in product types such as interest-only and option ARM loans and participation in subprime). Freddie Mac also disclosed, in exacting detail, the portions of its various portfolios that were exposed to

subprime and other nontraditional mortgages. See, e.g. App. 34 at 7, 9 (Slides from Sept. 10, 2007 Lehman Bros. Conf.); App. 38 at 9 (Slides accompanying Nov. 20, 2007 Press Release); App. 30 at 11 (Slides from June 14, 2007 Conference Call).

Plaintiff does not, and cannot, challenge the accuracy of any of the hard data that Freddie Mac disclosed, which described with precision the extent of Freddie Mac's investment in subprime and nontraditional mortgages. Plaintiff and other investors in Freddie Mac's stock were fully on notice of Freddie Mac's participation in that growing segment of the real estate market.

b. Freddie Mac Broadly Disclosed The Risks Associated With Its Investment In Subprime And Nontraditional Mortgages.

Plaintiff's allegation that Defendants failed to disclose the increased risks associated with the purchase of subprime and nontraditional loans also lacks any legitimacy. See, e.g., AC ¶ 1, 73. While the market was capable of assessing on its own the obvious fact that subprime and nontraditional mortgage products give rise to greater risk of loss than prime mortgage products, Freddie Mac provided explicit warnings to investors regarding the "additional credit risk inherent in [those] products." App. 2 at 24 (2005 Annual Report). For example, Freddie Mac disclosed:

- [W]e are purchasing loans and mortgage-related securities that offer lower expected returns on our investment and increase our exposure to credit losses. In addition, in order to meet future housing goals and **subgoals**, our purchases of goal-eligible loans need to increase as a percentage of total new mortgage purchases, which is causing us to forego other purchase opportunities that we would expect to be more profitable. App. 3 at 13 (2006 Annual Report) (emphasis added).
- **We increased our purchases** of . . . **variable-rate and non-traditional mortgage products** as they became more prevalent in the market. . . . We generally seek higher compensation for the **additional credit risk inherent in these products**; however, our ability to do so has been limited due to competition for this business. App. 3 at 24 (2006 Annual Report) (emphasis added).

Moreover, Freddie Mac explicitly warned investors about its ability to manage business risks, along with the effect that changing economic conditions could have on its business and earnings. See supra pp. 6-8; App. 3 at 12 (2006 Annual Report) ("Our risk management efforts may not effectively mitigate the risks we seek to manage."). See also App. 2 at 10-12 (2005

Annual Report) (discussing business and operational risks); Id. at 13-15 (discussing competitive and market risks).

Freddie Mac armed Plaintiff and its other investors with these and many other disclosures concerning its increased participation in the subprime and nontraditional mortgage markets. Plaintiff had the choice of either assuming the risks associated with Freddie Mac's participation in these markets or refraining from purchasing Freddie Mac stock. Plaintiff cannot now be heard to complain that the very risks it knowingly assumed have given rise to losses. As courts often stress, the federal securities laws do not provide the Plaintiff "investment insurance," which is what Plaintiff is seeking in this case. Raab, 4 F.3d at 291.

c. Freddie Mac Made Numerous Disclosures Concerning Its Underwriting Standards And Loan Delinquencies.

Plaintiff claims that Defendants failed to disclose risks arising from the underwriting of loans it purchased. See, e.g., AC ¶ 77. In fact, however, Freddie Mac warned investors:

- We rely on third parties for certain functions that are critical to financial reporting, our Retained portfolio activity **and mortgage loan underwriting**. **Any failures by those vendors could disrupt our business operations**. App. 3 at 12 (2006 Annual Report) (emphasis added); see also App. 2 at 63-64 (2005 Annual Report); App. 3 at 66 (2006 Annual Report).

Plaintiff also claims that Defendants failed to disclose that delinquencies in its newer loans were increasing at a rate faster than the rate experienced by Freddie Mac's prior loans. AC ¶ 77. In fact, Freddie Mac regularly updated the market concerning its loan delinquencies relative to the industry as a whole. See App. 34 at 6 (Slides from Sept. 10, 2007 Lehman Bros. Conf.); App. 27 at 12 (Slides from May 17, 2007 Lehman Bros. Conf.); App. 30 at 15 (Slides from June 14, 2007 Conf. Call). Again, Plaintiff does not challenge the accuracy of the hard facts that Freddie Mac disclosed.

d. Freddie Mac Issued Numerous Disclosures Concerning Material Weaknesses In Its Internal Controls.

Plaintiff alleges that Defendants concealed from the market that Freddie Mac had deficiencies in its fraud detection systems. AC ¶ 77. Plaintiff also alleges that Defendants failed

to disclose that Freddie Mac's internal controls and business methods were incapable of managing, identifying and guarding against massive losses in nontraditional loan product investments. AC ¶ 153. Putting aside Plaintiff's failure specifically to connect either of those alleged issues to any loss about which it complains, Freddie Mac did warn investors about risks arising from internal control deficiencies. For example:

- We have discovered, and may in the future discover, material weaknesses and significant deficiencies in our internal controls that require remediation. Due to these weaknesses and deficiencies, management determined that, as of December 31, 2005, our internal control over financial reporting was not effective. App. 2 at 10 (2005 Annual Report).
- **<u>Operational risks</u>** are inherent in all of our business activities and **<u>can become apparent in various ways, including</u>** accounting or operational errors, business interruptions, **<u>fraud</u>**, failures of the technology used to support our business activities and other operational challenges resulting from failed or inadequate internal controls. **<u>We face a number of significant operational risks, including material weaknesses and other significant deficiencies in our internal control over financial reporting</u>**. App. 4 at 21 (Info Supp. to 2006 Annual Report) (emphasis added).
- We face a number of significant operational risks, including material weaknesses and other significant deficiencies in our internal control over financial reporting. **<u>These operational risks may expose us to financial loss</u>**, may delay or interfere with our ability to return to and sustain timely financial reporting, or **<u>may result in other adverse consequences</u>**. App. 3 at 56; <u>see also</u> <u>id.</u> at 11.

e. Freddie Mac Broadly Disclosed The Nature <u>Of Its Guarantee Business And Attendant Risks.</u>

Plaintiff conclusorily alleges that Freddie Mac concealed that it had guaranteed billions of dollars of nontraditional high-risk mortgages sold to others. AC ¶ 153. In fact, defendants fully disclosed the nature of its guarantee obligation, and attendant risks, in various public disclosures:

- [W]e guarantee securities backed by subprime mortgages, which comprise a portion of the "alternative collateral deals" we purchase. . . . **<u>At December 31, 2005 and 2004, we guaranteed $2.3 billion and $4.5 billion of securities backed by subprime mortgages which constituted less than one percent of our Total mortgage portfolio, respectively</u>**. App. 2 at 66 (2005 Annual Report) (emphasis added).
- We increased our purchases of . . . variable-rate and non-traditional mortgage products as they became more prevalent in the market. However, at December 31, 2006, long-term, fixed-rate mortgages comprised more than 80 percent of our credit guarantee portfolio. During 2006, **<u>interest-only mortgages comprised approximately 16 percent of our</u>**

purchases and, at December 31, 2006, comprised approximately 5 percent of the total credit guarantee portfolio. Mortgages with optional payment terms, referred to as "option ARMs," comprised approximately 2 percent of purchases and approximately 1 percent of our total credit guarantee portfolio. App. 3 at 24 (2006 Annual Report) (emphasis added).

- [A]s discussed in "BUSINESS," the mortgages added to our portfolio in recent years do not have the benefit of significant home price appreciation and, in some markets, recent values of the properties underlying the mortgages have declined. **As recently acquired credit guarantee business matures and enters its peak default years, we anticipate that default rates and loss severities will trend higher**. Id. (emphasis added).

f. Freddie Mac Disclosed The Risks Associated With Its Mortgage Insurer Agreements.

Plaintiff alleges that Defendants concealed that "Freddie Mac's guarantee exposure was not protected or properly transferred to credit-worthy mortgage insurers" and that Defendants knew, but failed to reveal, that "many of Freddie Mac's third party mortgage insurers were not financially able to meet their insurance contracts." AC ¶ 154. Not only has Plaintiff failed adequately to plead any specific facts supporting these allegations, but Freddie Mac made specific disclosures regarding these matters.

The Company disclosed that: (1) it was subject to institutional credit risk arising from agreements with mortgage loan insurers (App. 3 at 78 (2006 Annual Report)); and (2) it was subject to institutional credit risk relating to the possibility that those mortgage loan insurers could become insolvent or otherwise not perform. App. 2 at 75 (2005 Annual Report).

Plaintiff fails to allege how any alleged omission rendered misleading any challenged statement, many of their omission claims constitute charges of non-actionable mismanagement, and much of the allegedly omitted information was disclosed. For all of those reasons, none of the alleged omissions support any federal securities law claim.

B. The Statements Upon Which Plaintiff Bases Its Claims Are Not Actionable Under Section 10(b).

Just as Plaintiff has failed to state a claim against Defendants based on any **omission** of material fact, Plaintiff also has failed to state a claim based on any allegedly false or misleading

statement of material fact. Every statement that Plaintiff challenges as an alleged misrepresentation is not actionable as a matter of law.

Under long-standing principles of federal securities law, a plaintiff cannot predicate a claim for securities fraud on: (1) accurate statements of historical fact; (2) vague and indefinite statements of optimism about a company's business or future prospects; (3) language that "bespeaks caution"; or (4) characterizations of actual statements. Here, a statement-by-statement analysis of each alleged misrepresentation demonstrates that, under these legal doctrines, Plaintiff fails sufficiently to plead an actionable claim for securities fraud under Section 10(b), as a matter of law.[30]

1. Accurate Statements Of Historical Fact Are Not Actionable.

It is well-settled that accurate statements of historical fact are not actionable under Section 10(b). See Ford Motor Co., 381 F.3d at 570; Sofamor Danek, 123 F.3d at 401 n.3 ("[A] violation of federal securities law cannot be premised upon a company's disclosure of accurate historical data.") (internal citation omitted). In fact, "[t]he disclosure of accurate historical data does not become misleading even if . . . [the company might predict] less favorable results . . . in the future." Id. (alteration in original). As the First Circuit stressed in Capri Optics Profit Sharing v. Digital Equip. Corp., 950 F.2d 5 (1st Cir. 1991):

> [I]f defendant reported, correctly, without more, "This is our eighth consecutive quarter in which our gross has increased," there was no duty to add, for the benefit of market buyers, "We are concerned about the next one."

Id. at 8. Another court explained: "To give . . . credence [to claims based on accurate historical statements] would be akin to imposing liability for truthfully saying the 'sky was blue yesterday' when the sky turns out to be gray the next day." Greenberg v. Compuware Corp., 889 F. Supp. 1012, 1017 (E.D. Mich. 1995). As discussed below, many of the alleged misrepresentations are not actionable, as a matter of law, because they are accurate statements of historical fact that Plaintiff has not challenged as false.

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[30] See Ferro, 2007 WL 1691358, at *18 (a securities fraud plaintiff must plead fraud on a "statement-by-statement basis").

2. Vague And Indefinite Statements Of Optimism Are Immaterial, As A Matter Of Law.

Immaterial statements upon which a reasonable investor would not rely, such as "vague, soft, puffing statements or obvious hyperbole," cannot give rise to liability under the federal securities laws. Ford Motor Co., 381 F.3d at 570-71 (citation omitted); see also Hess v. Am. Physicians Capital Inc., No. 04- 31, 2005 WL 459638, at *8 (W.D. Mich. Jan. 11, 2005). Given that "[a]ll public companies praise their products and their objectives," courts in this Circuit, and elsewhere, routinely dismiss securities fraud class actions predicated on such statements. Ford Motor Co., 381 F.3d at 570. As the Sixth Circuit has observed:

> Courts everywhere "have demonstrated a willingness to find immaterial as a matter of law certain kinds of rosy affirmation heard from corporate managers and numbingly familiar to the marketplace -- loosely optimistic statements that are so vague, so lacking in specificity, or so clearly constituting the opinions of the speaker, that no reasonable investor could find them important to the total mix of information available."

Id. at 570-71 (quoting Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1217 (1st Cir. 1996)). Such inactionable puffery includes "loose optimism about both an issuer's current state of affairs and its future prospects." In re Peritus Software Servs. Inc. Sec. Litig., 52 F. Supp. 2d 211, 220 (D. Mass. 1999) (cited with approval by the Sixth Circuit in PR Diamonds, 364 F.3d at 688).

A large number of the statements that Plaintiff challenges as false or materially misleading contain statements or phrases that courts regularly hold to be inactionable corporate puffery. For example, generalized optimistic statements concerning a company's risk management constitute mere puffery:[31]

> See, e.g., In re New York Cmty. Bancorp Sec. Litig, 448 F. Supp. 2d 466, 478-79 (E.D.N.Y. 2006) ("**[G]eneralizations regarding integrity, fiscal discipline, and risk management [ ] amount to no more than inactionable puffery**"; statement that "[**the company's**] **greatest asset was that it is risk-averse** and **that strategy permeates every decision** the company makes" was not actionable); In re JP Morgan Chase Sec. Litig., 363 F. Supp. 2d 595, 612, 632-33 (S.D.N.Y. 2005) (statements that a company "set the standard for **best practices in risk management** techniques," that "**[d]isciplined management of . . . risks is**

[31] See AC ¶¶ 79-88, 90, 94, 101, 103-06, 111, 112-14.

> **fundamental** to protecting the shareholder value," and **risks were** "**accurately assessed**" amounted to no more than puffery).

Similarly, courts hold statements containing phrases such as "well-positioned" when used to describe a company's positioning vis-à-vis competitors, and the market in general, to be inactionable as a matter of law: [32]

> See, e.g., Coble v. Broadvision, Inc., No. 01-1969, 2002 WL 31093589, at *1 (N.D. Cal. Sept. 11, 2002) (statement that company was "**well positioned** . . . to thrive and emerge an even stronger player" not actionable); Fitzer v. Sec. Dynamics Techs., Inc., 119 F. Supp. 2d 12, 23 (D. Mass. 2000) (statement that "[t]here are very **few companies** that **are positioned as well as us** and have the track record" and other statements "relating to whether [company] was '**well positioned**'" deemed no more than inactionable puffing).

Statements using vague, generalized terms such as "strong" and "prudent" when used to describe, inter alia, a company's business, fundamentals, or performance are also considered immaterial puffery under the federal securities laws:[33]

> See, e.g., Rosenzweig v. Azurix Corp., 332 F.3d 854, 869 (5th Cir. 2003) (statement that "'**[o]ur fundamentals are strong**' is obviously immaterial puffery"); Next Century Commc'ns Corp. v. Ellis, 318 F.3d 1023, 1028 (11th Cir. 2003) (CEO's statement that company's performance was "**strong**" constituted mere puffery); Impac, 554 F. Supp. 2d at 1097 (characterization of company's fundamentals, loan acquisitions and originations as "solid" was non-actionable "vague expression of optimism"); Frota v. Prudential-Bache Sec., Inc., 639 F. Supp. 1186, 1190 (S.D.N.Y. 1986) (assurances that investors' account would be "**properly and prudently managed**," that transactions were being carried out in a "**reasonable manner**," and that investors "**could trust**" defendant, constituted puffing and were not actionable).

As discussed further below, many of the alleged misrepresentations that Plaintiff challenges are not actionable because they are vague and indefinite statements of optimism that constitute immaterial puffery.

3. Statements That "Bespeak Caution" Are Not Actionable As A Matter Of Law.

"[W]hen statements of 'soft' information such as forecasts, estimates, opinions or projections are accompanied by cautionary disclosures that adequately warn of the possibility

[32] See AC ¶¶ 80, 86, 96-97, 103-05, 111.
[33] See AC ¶¶ 79, 80, 85, 86, 87, 88, 89, 90, 103, 104, 107, 111-14, 143, 144, 146, 148-50.

that actual results or events may turn out differently, the 'soft' statements" are not actionable as a matter of law, because they "bespeak caution." Stavroff v. Meyo, No. 95-4118, 1997 WL 720475, at *4 (6th Cir. Nov. 12, 1997). The "bespeaks caution" doctrine, while similar to the PSLRA safe harbor, provides "an independent test of materiality." Andropolis v. Red Robin Gourmet Burgers, Inc., 505 F. Supp. 2d 662, 676 (D. Colo. Jan. 2, 2007); see also In re Metropolitan Sec. Litig., 532 F. Supp. 2d 1260, 1291 n.8 (E.D. Wash. 2007) ("While the PSLRA Safe Harbor codifies the bespeaks caution doctrine, the bespeaks caution doctrine remains a defense in its own right."). As the Third Circuit has explained, "'bespeaks caution' is essentially shorthand for the well-established principle that a statement or omission must be considered in context, so that accompanying statements may render it immaterial as a matter of law." In re Trump Casino Sec. Litig., 7 F.3d 357, 364 (3d Cir. 1993) (holding, inter alia, that bespeaks caution doctrine rendered immaterial alleged misrepresentations and omissions in light of meaningful cautionary language).

The facts of Polin v. Conductron Corp., 552 F.2d 797 (8th Cir. 1977), cert. denied, 434 U.S. 857 (1977), illustrate the application of this doctrine. In Polin, the plaintiffs based their securities fraud claim on, inter alia, defendant's statements in its annual report that "the results for 1968 were 'expected' to show improvement, and the Company saw a 'possibility' of a break-even soon." 552 F.2d at 806, n.28 (emphasis added). Holding the alleged statements not actionable, the Eighth Circuit stated:

> The terms thus employed bespeak caution in outlook and fall far short of the assurances required for a finding of falsity and fraud. Language of expectation, of anticipation, and of possibilities recognizes the imponderable influences of complex variables in a fast-changing field.

Id. (emphasis added).

As one federal district court recently ruled in dismissing misrepresentation claims, as a matter of law, under the "bespeaks caution" doctrine:

> [T]he "bespeaks caution" doctrine "provides a mechanism by which a court can rule as a matter of law that defendant['s] forward-looking representations contained enough cautionary language or risk disclosure to protect the defendant

> against claims of securities fraud." Provenz v. Miller, 102 F.3d 1478, 1484 (9th Cir. 1996). . . . The "bespeaks caution" doctrine reflects "the unique nature of fraud actions based on predictive statements. In essence, predictive statements are just what the name implies: predictions. As such, any optimistic statements contained in such statements are necessarily contingent." In re Worlds of Wonder [WOW] Securities Litigation, 35 F.3d 1407, 1414 (9th Cir. 1994). The "market has risks; the securities laws do not serve as investment insurance." Raab v. General Physics Corp., 4 F.3d 286, 291 (4th Cir. 1993). "Thus, the 'bespeaks caution' doctrine has developed to address situations in which optimistic statements are coupled with cautionary language -- in particular, relevant specific facts or assumptions -- affecting the reasonableness of reliance on and the materiality of those projections." In re WOW, 35 F.3d at 1414.

Herring v. Teradyne, Inc., No. 01-1835, slip op. at 9 (S.D. Cal. Aug. 29, 2008) (alterations in original).

As in Polin, many of the challenged statements in this case bespoke caution in outlook and therefore are not actionable, as a matter of law. Citing press releases, presentations and conference calls, Plaintiff challenges as false or misleading numerous forward-looking statements. See AC ¶¶ 84-86, 88, 91, 102-03, 106-08, 111-12, 147. Those press releases, presentations and conference calls all contain meaningful cautionary language and/or expressly refer to the risk factors in Freddie Mac's Annual Reports. See App. 7 at 3 (Aug. 1, 2006 Press Release); App. 8 at 1 (Aug. 1, 2006 Conf. Call); App. 10 at 1 (Slides from Sept. 12, 2006 Lehman Bros. Conf.); App. 13 at 2 (Oct. 3, 2006 Conf. Call); App. 17 at 16 (Slides from Jan. 30, 2007 Citigroup Conf.); App. 27 at 17 (Slides from May 17, 2007 Lehman Bros. Conf.); App. 29 at 4-5 (June 14, 2007 Press Release); App. 30 at 2 (June 14, 2007 Conf. Call); App. 33 at 2 (Aug. 30, 2007 Conf. Call); App. 34 at 12 (Slides from Sept. 10, 2007 Lehman Bros. Conf.); App. 15 at 4 (Jan. 5, 2007 Press Release).[34] As set forth above, Freddie Mac's Annual Reports for 2005 and 2006 set forth in great detail the numerous risks that could affect Freddie Mac's investments and business, as did the many press releases on which Plaintiff relies. See supra pp. 6-8, 37, 39-40.

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[34] In a public disclosure containing forward-looking statements, a corporation may incorporate by reference the risk factors set forth in its recent financial disclosures. See Miller, 346 F.3d at 677-78 (holding that forward-looking statement in letter to shareholders could not give rise to liability because letter referenced risk factors in recent Form 10-K); In re Keithley Instruments, 268 F. Supp. 2d at 904 (holding that forward-looking statements were immune from liability under PSLRA's safe harbor, noting that press releases referred investors to warnings contained in recent Form 10-Q).

In light of these extensive cautionary disclosures, the “bespeaks caution” doctrine precludes Plaintiff’s claims with respect to the challenged forward-looking statements.

The PSLRA’s safe harbor provision underscores that forward-looking statements are not actionable under Section 10(b) of the 1934 Act if they are accompanied by “meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement.” 15 U.S.C. § 78u-5(c)(1). Indeed, the PSLRA’s safe harbor provision is a statutory codification of the “bespeaks caution” doctrine. See Helwig v. Vencor, Inc., 251 F.3d 540, 547-48 (6th Cir. 2001) (recognizing that the safe harbor is “[b]ased on the judicial ‘bespeaks caution’ doctrine”); Shaw, 82 F.3d at 1213, n.23 (“The [bespeaks caution] doctrine has been codified in the [PSLRA]”), superseded by statute on other grounds, as noted in Greebel v. FTP Software, Inc., 194 F.3d 185, 197 (1st Cir. 1999). As the Sixth Circuit has explained, this safe harbor provision shields defendants from liability even if the challenged forward-looking statement was knowingly false when made:

> [F]or ‘forward-looking statements’ that are accompanied by meaningful cautionary language, the first prong of the safe harbor provided for in the PSLRA makes the state of mind irrelevant. In other words, if the statement qualifies as ‘forward-looking’ and is accompanied by sufficient cautionary language, a defendant’s statement is protected regardless of the actual state of mind.

Miller v. Champion Enter., Inc., 346 F.3d 660, 672 (6th Cir. 2003) (affirming dismissal of securities claims where forward-looking statements were accompanied by meaningful cautionary language) (emphasis added) (citations omitted). The PSLRA’s safe harbor applies not only to statements that are expressed in the future tense, or couched in terms of belief or expectation, but also to statements that, while stated in the present tense, are dependent on future events before their veracity can be determined. See Hess, 2005 WL 459638, at *7 (holding that disclosures regarding the adequacy of defendant’s loan loss reserves were forward looking); In re Kindred Healthcare, Inc. Sec. Litig., 299 F. Supp. 2d 724, 738 (W.D. Ky. 2004) (“The amount Kindred keeps in reserves to cover liability claims is necessarily a prediction about its future claims experience . . . [which] could only be verified when liability claims were actually filed, litigation

to conclusion, or settled. It would seem beyond argument that such projections . . . are forward-looking within the meaning of the PSLRA.").[35]

To obtain the protections of the PSLRA's safe harbor, companies do not have to predict the future accurately, but rather they must disclose those risks important to their projections. See In re Cytyc Corp. Sec. Litig., No. 02-12399, 2005 WL 3801468, at *21 (D. Mass. Mar. 2, 2005) ("[T]he cautionary statement does not necessarily have 'to include the particular factor that ultimately causes the forward-looking statement not to come true.'") (citation omitted); see also Hess, 2005 WL 459638, at *7.

Applying the safe harbor, courts in the Sixth Circuit and elsewhere have confirmed that cautionary language shields a company from liability for its forward-looking statements. See, e.g., Miller, 346 F.3d at 675-78 (affirming dismissal of securities claims); Ferro, 2007 WL 1691358, at *56 (granting motion to dismiss securities claims); In re Keithley Instruments, 268 F. Supp. 2d 887, 904-05 (N.D. Ohio 2002) (same); see also Impac, 554 F. Supp. 2d at 1098 (holding that company's statement that it expected "solid" loan acquisitions and originations was protected by the PSLRA's safe harbor).

4. Characterizations Cannot Replace Actionable Statements.

As illustrated above (see supra pp. 11-12) and discussed further below (see infra Part II.C), Plaintiff's Amended Complaint is laden with characterizations in lieu of what Defendants actually said, and snippets of Defendants' statements that Plaintiff removes from their context. As courts have held, however, such characterizations lack any legal significance. See In re Copley Pharm., Inc. Sec. Litig., No. 94-11897, 1995 WL 169215, at *2 (D. Mass. March 16, 1995). Like the Amended Complaint here, the 60-page complaint in Copley "center[ed] around 'impressions,'" which the court termed "the securities analogue to 'penumbras and emanations' left by the statements." Id. In dismissing 28 of the 29 statements at issue, the Court held:

[35] When forward-looking statements are prefaced with underlying present tense assumptions, both the forward-looking statements and the present tense assumptions are protected by the PSLRA's safe harbor. See 15 U.S.C. § 78u-5(i)(1)(D); see also Miller, 346 F.3d at 677.

> Securities law is not about fostering senses; it is about actual statements, whether or not they are true or false, and, if false, whether or not the utterer knew at the time the statements were made that they were false.

Id. at *2, n.5.

Similarly, Plaintiff here cannot remedy its failure to allege a single specific misstatement by mischaracterizing what Defendants actually said. See Melder v. Morris, 27 F.3d 1097, 1100 (5th Cir. 1994) (affirming grant of motion to dismiss securities fraud class action where "plaintiffs fail[ed] to base their allegations on statements actually made by [defendants], opting instead to selectively distort the company's public statements to create an inference of fraud") (emphasis in original). Admittedly, while the Court needs a machete to cut through the dense jungle of characterizations contained in Plaintiff's Amended Complaint, none of statements that Defendants actually made constitutes a material misrepresentation of fact.

C. An Application Of The Foregoing Legal Doctrines To Each Of The Challenged Statements Establishes That None Of The Challenged Statements Is Actionable, As A Matter Of Law.

In its Amended Complaint, Plaintiff challenges as false or materially misleading myriad statements issued between August 1, 2006 and November 20, 2007. A statement-by-statement examination of the challenged statements, however, rather than Plaintiff's mischaracterizations or clipped versions of those statements, tells a story that is completely at odds with Plaintiff's misleading distortions. Indeed, the "totality of the statements" Plaintiff relies on here, i.e., each statement examined in full and in context, "reflects neither misleading optimism nor fraud." See In re Philip Morris Sec. Litig., 872 F. Supp. 97, 101 (S.D.N.Y. 1995), aff'd sub nom., San Leandro Emergency Med. Group v. Philip Morris, 75 F.3d 801, 811 (2d Cir. 1996).

The Second Circuit has rejected putative securities fraud allegations similar to those asserted here. In Philip Morris, plaintiffs filed a shareholder class action complaint arguing that defendants fraudulently made a number of positive statements before a negative announcement, in order artificially to inflate the company's stock price. Id. at 99-100. Granting defendants' motion to dismiss with prejudice, the court concluded that "the totality of all these statements

reflects neither misleading optimism, nor fraud." Id. at 101. In reaching that conclusion, the court explained:

> **Disclosure requirements are not intended to "attribute to investors child-like simplicity"**; investors are presumed to have the ability to be able to digest varying reports and data. The total mix of information is determinative, and **the court must assess**, as must investors at the time, **all of the statements** and predictions issued by Philip Morris **in the context, fluid as it was, in which they were made.**

Id. (emphasis added) (citations omitted). Applying that well-settled law, the court in Philip Morris carefully analyzed, in whole, the entire context of each partial statement upon which plaintiffs relied, including the full text of each newspaper article from which plaintiffs had extracted a quotation. Id. at 99-101.[36] After reviewing those statements in full, the court concluded:

> [F]raud can only be perpetrated upon the market if that market does not have material information or had incomplete or inaccurate information. . . . **Under the efficient market hypothesis the market price of shares traded on a sophisticated market reflects all available information**. **Accordingly, in viewing this complaint, balanced by omitted portions of statements plaintiffs otherwise rely upon, it appears that all material information was available**.

Id. at 102-03 (emphasis added) (citations omitted). Applying that reasoning, together with the legal principles explained above, to each of the challenged statements at issue here, reveals that Plaintiff has failed sufficiently to plead that any of those statements is actionable.

1. AC ¶ 84: August 1, 2006 Press Release.

Plaintiff alleges that Freddie Mac's August 1, 2006 press release "falsely **portrayed** Freddie Mac's exposure to risk." AC ¶ 84 (emphasis added). Specifically, Plaintiff asserts that the following statements were false and misleading: (1) that Freddie Mac experienced "continued excellent interest rate and credit risk management performance" during the first half of 2006; (2) that Freddie Mac's "mortgage credit risk, as measured by loan-to-value (LTV) ratio

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[36] In Philip Morris, as here, the plaintiffs had omitted from their complaint key portions of statements upon which they had relied. Id. at 100, 102. Like Defendants here, the Philip Morris defendants put before the court "the context and additional parts of plaintiffs' selected quotations," which the court properly considered in dismissing the case. Id.

and other credit characteristics, remains low"; and (3) that "[m]anagement continues to expect credit losses to remain low by historical standards." Id. These statements, which Plaintiff quotes out of context, are not actionable for several reasons.

First, the statement respecting mortgage credit risk is not actionable because it is an accurate statement of historical fact, based on disclosed hard data in the press release, which Plaintiff does not challenge. Plaintiff selectively removes these statements from context, omitting the following sentences that specifically disclose the Company's LTV ratio and "other credit characteristics":

> We estimate the LTV ratio of our credit guarantee portfolio to be 56 percent as of the end of the first quarter. Our credit guarantee portfolio remains well diversified nationally, and long-term, fixed-rate prime mortgages continue to comprise more than 80 percent of the total mortgage portfolio as of May 31, 2006, despite the recent increase in our purchases of floating-rate and non-traditional mortgage products.

App. 7 at 2.[37] Second, the Company's statement that it experienced "continued **excellent** interest rate and credit risk management performance" -- while substantiated by the financial results that Freddie Mac disclosed that day -- constitutes non-actionable corporate puffery. See supra Part II.B.2.

Third, the statement that "[m]anagement continues to expect credit losses to remain low by historical standards" is a forward-looking statement accompanied by meaningful cautionary language and thus immune from liability. See supra Part II.B.3. More specifically, the challenged press release included a warning, which expressly referenced the Company's most recent Information Statement. See App. 7 at 3. As set forth above, Freddie Mac issued robust public disclosures concerning interest rate risk and credit risk. See supra pp. 6-8. Fourth, Plaintiff does not allege how or why any of these statements were false or misleadingly incomplete. See supra Parts II.B, II.A.1.

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[37] Defendants refer the Court, in the first instance, to the full text of each statement at issue, which is contained in Defendants' Appendix.

2. AC ¶ 85: August 1, 2006 Market Update.

Plaintiff conclusorily alleges, without citation to any specific facts, that the following statements were knowingly false: (1) "Our low level of interest rate and credit risk is unchanged;" (2) "**Our release today demonstrates** that our risk management approach is **time-tested**, and we continue to operate our business in a manner that is consistent with **strong** interest rate and credit risk management"; and (3) "I would say that we believe we have **strong** -- and you can look at the numbers that we've put out on this -- credit risk and interest rate control." AC ¶ 85 (emphasis added). The first statement is an accurate statement of historical fact, based on disclosed, hard data, that Plaintiff has not challenged as false. See supra Part II.B.1. The other challenged statements constitute immaterial puffery, which is not actionable as a matter of law. See supra Part II.B.2. These statements are also forward-looking statements that were accompanied by meaningful cautionary language, and thus immune from liability. See supra Part II.B.3. Indeed, Plaintiff selectively omits the statement immediately following that quoted remark, which cautioned: "[W]e do agree with the director [of OFHEO] that we have more work that we need to do with our operating systems and in addressing operating risks." App. 8 at 3.

3. AC ¶ 142: September 8, 2006 Remarks At Shareholder Meeting.

Plaintiff challenges a portion of Defendant Richard Syron's remarks at a September 8, 2006 shareholder meeting, focusing on the following statement:

> Freddie Mac grew our regulatory core capital to almost $36 billion last year -- well above the capital requirements set by our safety and soundness regulator. As a result of our strong capital position and confidence in our profitability, we increased our quarterly stock dividend twice last year.

AC ¶ 143. The majority of the statements in these remarks are not actionable because they are accurate statements of historical fact, which Plaintiff does not challenge as false. See supra Part II.B.1. The statements that Freddie Mac had a "strong capital position" and "confidence in [its] profitability" are too vague to be actionable. See supra Part II.B.2.

4. AC ¶ 86: September 12, 2006 Remarks At Lehman Brothers Conference.

To attack Mr. Syron's remarks at a September 12, 2006 Lehman Brothers conference, AC ¶ 86, Plaintiff deceptively removes these remarks from context by replacing key statements with ellipses and quoting statements out of sequence. See App. 10 at 1-4. Indeed, Plaintiff conveniently omits Mr. Syron's cautionary remarks that expressly warn investors concerning the negative effect that a downturn in the U.S. housing market would have on Freddie Mac's business:

- While our strong capital position and market share are no doubt gratifying, clearly they reflect what we did for you yesterday. In contrast, **our future success depends on** our ability to improve on our current business by returning to timely financial reporting, and **responding to changing conditions in the U.S. housing market**. (emphasis added).

- **The housing market** has **clearly slowed since mid-2005** . . . . As you can see, the rapid pace of home sales and price appreciation that we experienced from 2001 through 2005 has moderated. . . . [A]s of the end of July **inventories** of new and existing homes were **higher then they have been in the past 10 years**, and well above their average level from the early 90's, another transitional period. Similarly . . . **nominal home price appreciation has slowed significantly** in the past 12 months, and is running at an average rate that is slightly below the long-term average. (emphasis added).

- [S]ince 2003, the same growth in values that has benefited many homeowners has coincided with significantly reduced housing *affordability* overall. The combination of higher prices and rising interest rates has made housing *less affordable today* than it has been at any time since 1990. We need to turn this trend of declining affordability around, but **it won't be easy**. (first and second emphasis in original).

See App. 10 at 1-2 (emphasis added). Accordingly, Mr. Syron's forward-looking statements regarding the risks to its future performance and the fact that its "guarantee business is positioned to weather even a harsh credit environment," while too vague to be actionable, were also accompanied by meaningful cautionary language, and thus immune from liability. See supra Parts II.B.2, 3. It is also worth noting that these challenged statements were made in September 2006, before U.S. home prices plunged at a historically unprecedented rate in the second half of 2007. (Many of the other alleged misrepresentations discussed below were also made prior to that time.) As one court recently recognized, in dismissing securities fraud claims similar to those pled here: "[C]ompanies (and their management) are not expected to be

clairvoyant, and [allegedly] bad decisions do not constitute securities fraud." NovaStar, 2008 U.S. Dist. LEXIS 44166, at *13.

The remaining statements are accurate statements of historical fact that Plaintiff does not challenge as false and/or statements that are too vague to be actionable. See AC ¶ 86; supra Parts II.B.1-2.

5. AC ¶ 144: September 18, 2006 Remarks At Bank of America Conference.

The statement made by Freddie Mac's Senior Vice President and Treasurer at a September 18, 2006 investment conference that Freddie Mac had a "strong and growing capital base," AC ¶ 144, is not actionable, in the first instance, because it is an accurate statement of historical fact, which Plaintiff does not challenge as false. See supra Part II.B.1. As Freddie Mac's disclosures reveal, its capital base had grown from prior periods to the time of the alleged statement in September 18, 2006. App. 11. In addition, the characterization of the capital base as "strong" is too vague to be actionable. See supra Part II.B.2.

6. AC ¶¶ 87, 145: October 3, 2006 Press Release.

Plaintiff challenges as false two statements from Freddie Mac's October 3, 2006 press release. The first statement that Plaintiff challenges -- replete with such terms and phrases as "prudently," "strong," "building close ties," and "strengthens our franchise" -- is too vague to be actionable. See supra Part II.B.2; AC ¶¶ 87, 145. The second statement that Plaintiff challenges, regarding Freddie Mac's credit risk as measured by its current loan-to-value ratio, is virtually identical to the statement that Plaintiff challenges in Paragraph 84 (Statement No. 1 above), and it is not actionable for the same reasons.

7. AC ¶¶ 88, 146: October 3, 2006 Market Update.

In Paragraph 88 of the Amended Complaint, Plaintiff simply inserts a lengthy block quote spanning well over a page, omits key disclosures from the quote, bolds and italicizes certain statements within the block quote, and then leaves it to the Court and Defendants to figure out which particular quoted statements are allegedly false or misleading, and why. AC

¶ 88. Although Plaintiff bolds a collection of statements for apparent emphasis, nowhere does Plaintiff allege how or why any statement made was false or misleading. For example, Plaintiff bolds the statement that "the voluntary growth limit on the portfolio will make it important for us to be selective in which mortgages we purchase to achieve the strongest returns possible for the limited growth we are going to have." Id. Plaintiff nowhere alleges that it **was not** important for Freddie Mac to be selective respecting the mortgages it purchased.

In addition, the statements that Plaintiff bolds and italicizes -- while not shown to be false -- are too vague to be actionable. See AC ¶¶ 88, 146 ("continued **strength** in our franchise," "risks continue to be **well managed and controlled**," "we have been **cautious**," "we have purchased the newer, more untraditional loans in a very **prudent and balanced** way" and "[l]ooking at capital we continue to maintain a **strong** position there as well") (emphasis added).

8. AC ¶ 89: October 18, 2006 Syron Public Remarks.

In Paragraph 89 of its Amended Complaint, Plaintiff challenges as a misrepresentation a single sentence that Plaintiff wrenches out of context from a six-page speech. AC ¶ 89. As an initial matter, the statement that Freddie Mac "purchased the newer, more untraditional loans in a **very prudent** and **balanced way - with very low credit losses as an added benefit**" is too vague to be actionable. See supra Part II.B.2. Further, to the extent that anything in this statement can be inferred to be hard data, rather than puffery, that statement is an accurate statement of historical fact, which Plaintiff has not challenged as false. See supra Part II.B.1. The undisputable fact is that Freddie Mac principally participated in the subprime market by purchasing AAA-rated bonds backed by subprime loans, and Plaintiff does not allege otherwise. See supra p. 6. Plaintiff nowhere alleges any facts, let alone specific facts, suggesting that Freddie Mac's method of fulfilling its mission was not prudent or balanced, given its decision to increase its investment in AAA-rated subprime bonds, as opposed to more risky lower rated bonds, CDO's, or a larger amount of whole subprime loans. See id. In addition, in context, Mr. Syron's statements bespeak caution in outlook. See supra Part II.B.3. In cherry-picking its alleged misrepresentation, Plaintiff also omits the numerous disclosures in that speech regarding

the ongoing "correction" in the U.S. housing market. See App. 14 at 1, 3, 4. For example, after noting that the U.S. was coming off a "housing market boom", Mr. Syron cautioned:

> We've also relearned the old rule that markets that move strongly in only one direction for a long period of time will inevitably correct. As a consequence, we're seeing **more riskiness and potential credit losses in the market now**. The way ahead looks **more uncertain** and requires more care than it has in a long time.

App. 14 at 3 (emphasis added). Mr. Syron also warned of the confluence of new mortgage products and their attendant risk:

> The pressures on affordability we're discussing today led to a whole array of untraditional products -- some of them appropriate, some pretty funky and not appropriate for many borrowers. And it has dawned on people that roughly $1 trillion in adjustable rate mortgages are scheduled to reset in the coming year.

Id. Moreover, nowhere does Plaintiff plead any specific facts indicating that Mr. Syron's statement was false. See supra Part I.C.

9. AC ¶ 147: January 5, 2007 Press Release.

Plaintiff challenges as "providing false assurances" the following statement from Freddie Mac's January 5, 2007 Press Release:

> Management **expects to continue** maintaining a surplus over both the regulatory minimum capital requirement and OFHEO's 30 percent mandatory target capital surplus across a wide range of market conditions.

AC ¶ 147 (emphasis added). This statement was a forward-looking statement accompanied by meaningful cautionary language (see App. 15 at 4) and thus immune from liability. See supra Part II.B.3. Moreover, Plaintiff does not identify a single specific fact to support an allegation that the statement was false when made. See supra Part I.C.

10. AC ¶ 90: January 5, 2007 Market Update.

In keeping with its misguided modus operandi for pleading securities fraud, Plaintiff plucks a block quote from the fourteen-page January 5, 2007 Market Update transcript and alleges, without more, that the quote contained unidentified "false assurances." AC ¶ 90. That statement is not actionable for several reasons. First, it contains accurate statements of historical fact that Plaintiff does not challenge as false. See supra Part II.B.1. Statements about Freddie

Mac's risk metric, loan-to-value ratio and total single-family delinquencies are not actionable, in the first instance, because they are accurate statements of historical fact, which Plaintiff does not challenge as false. See supra Part II.B.1. Second, the quote contains non-actionable corporate puffery, such as statements regarding "**well-managed** interest rate and credit exposures" and "**positive** long-term fair value returns," which are also not shown to be false. See supra Part II.B.2. Third, when considered in context, Mr. Syron's remarks bespeak caution in outlook. See supra Part II.B.3. For example, Mr. Syron warned:

> Given overall market concerns over deteriorating mortgage credit, we are going to watch these trends very carefully. Our historic track record -- while much better than the industry as a whole -- **suggests that credit losses will probably rise in the future, so we are cautious about the outlook for credit losses going forward**.

App. 16 at 4 (emphasis added). Moreover, Mr. Syron also warned that, given Freddie Mac's current accounting treatments under GAAP, "you can expect that we will continue to have **substantial volatility** in our financials over the foreseeable future." App. 16 at 7 (emphasis added).

11. AC ¶ 91: January 30, 2007 Remarks At Citigroup Conference.

Plaintiff alleges that Ms. Cook's remarks at a January 30, 2007 Citigroup conference falsely "downplay[ed]" Freddie Mac's risk exposure. AC ¶ 91. In support of that allegation, Plaintiff quotes a page-long excerpt from Ms. Cook's remarks at the Citigroup conference containing accurate statements of historical fact, vague and indefinite statements of optimism, and forward-looking statements accompanied by meaningful cautionary language, all of which are not actionable, as a matter of law. See supra Parts II.B.1-3.

12. AC ¶ 92: February 8, 2007 Remarks At Credit Suisse Conference.

At a Credit Cuisse Financial Services Conference, Mr. McQuade allegedly stated that, in the prior year (2006), "Freddie maintained very low interest-rate risk and credit exposures throughout the year. . . ." AC ¶ 92. He allegedly noted the Company's 2006 financial results do not reflect Freddie Mac's "consistently stable credit and interest rate risk exposures." Id. He

also allegedly mentioned that, throughout its history, Freddie Mac's mission has "meant keeping our credit and interest-rate risks low and well-managed," and that, "despite the increased mission efforts, and expanded guarantee activities in 2006, our current credit risk measures remain within, or below our historical levels." Id. Plaintiff has not alleged that any hard fact to which Mr. McQuade allegedly referred in that presentation (which had accompanying slides (see App. 18) was false. The remainder of the challenged statements are too vague to be actionable. See supra Part II.B.2.

13. AC ¶ 93: February 27, 2007 Press Release.

Plaintiff also alleges that "[i]nformation that is now publicly available, but was concealed during the Class Period, indicates that as Freddie Mac moved into 2007, its investment in subprime and nontraditional mortgages dramatically increased along with its risk." AC ¶ 93. As discussed above, Freddie Mac repeatedly disclosed that, consistent with its mission, it would be increasing its investment in subprime and nontraditional mortgages during that period. See supra Part II.A.3.a.

Further, Plaintiff challenges Freddie Mac's announcement on February 27, 2007 that, as of **September 1, 2007**, Freddie Mac would: (1) only buy subprime ARMs -- and mortgage-related securities backed by those subprime loans -- that qualify borrowers at the fully-indexed and fully-amortizing rate; and (2) limit the use of low-documentation underwriting for those types of mortgages. Plaintiff, however, fails to allege that any specific statement was false when made, let alone support such an allegation with specific facts. In short, Plaintiff's allegations in Paragraph 93 of the Amended Complaint are based on a gross distortion of what Freddie Mac actually disclosed prior to, and on, February 27, 2007.

14. AC ¶ 94: February 27, 2007 Bloomberg Article.

Plaintiff alleges that, in a February 27, 2007 Bloomberg article, Mr. Syron "falsely claimed that Freddie's investments in nontraditional products were insulated from risk." AC ¶ 94. This is not what Mr. Syron actually said. Rather, the Bloomberg article cited by Plaintiff allegedly quoted Mr. Syron as follows:

> Because investors in AAA mortgage bonds aren't impacted by loan losses until they reach high levels, "this is not at all a concern from a Freddie perspective, of safety and soundness," Syron said.

App. 20 at 2. In addition to Plaintiff's distortion, Plaintiff fails to state a claim based on the quoted statement for two reasons. First, Plaintiff pleads no specific facts to support its conclusion that the statement was false or misleading when made. That is, Plaintiff does not plead a single specific fact indicating: (1) that investors in AAA mortgage bonds **are** impacted by loan losses at levels other than high levels; or (2) that Freddie Mac **was** concerned at the time about the safety and soundness of its investment in AAA-rated mortgage bonds. Second, even if Plaintiff had pled specific facts demonstrating that Freddie Mac **should have** been concerned about its investment in AAA-rated mortgage bonds -- and Plaintiff has not -- Plaintiff's claim would amount only to a claim of corporate mismanagement that is not actionable under the federal securities laws, as a matter of law. See supra Part II.A.2. The Amended Complaint also fails to allege that Freddie Mac reported any credit loss during the Class Period that it incurred on any AAA-rated mortgage bond backed by subprime or non-traditional loans.

15. AC ¶ 95: February 27, 2007 Dow Jones Interview.

Plaintiff alleges that Syron "falsely assured" investors that the Company "had 'virtually no credit exposure' to subprime mortgages and mortgage related securities backed by those loans." AC ¶ 95. Again, that is not what Mr. Syron said. Plaintiff's allegation rests upon a mischaracterization of the Dow Jones article from which it is drawn, which states:

> Freddie Mac (FRE) said Tuesday it will stop buying subprime mortgages **with "a high likelihood of excessive payment shock and possible foreclosure"** originated after Sept. 1. The government-chartered loan clearinghouse said it will buy only subprime adjustable-rate mortgages, and mortgage-related securities backed by those loans, that qualify borrowers at the fully indexed and fully amortizing rate. Freddie Mac Chairman and [CEO] Richard Syron said the company had "virtually no credit exposure" **to these loans** in their portfolios but felt that **supporting such lending was not consistent with their government-chartered mission**.

App. 21 at 1 (emphasis added). In context, it is clear that Mr. Syron stated that Freddie Mac has virtually no credit exposure to subprime mortgages "with 'a high likelihood of excessive

payment shock and possible foreclosure.'" Id. Plaintiff has not alleged any facts suggesting that the foregoing assertion was false.

As Freddie Mac disclosed, less than 1% of its Guaranteed Portfolio was comprised of subprime mortgage loans of any kind, and its Retained Portfolio contained AAA-rated subprime bonds, not whole subprime mortgage loans. See supra Part II.A.3.a. Plaintiff does not contest the accuracy of those disclosures. Plaintiff has not identified any credit loss -- let alone any material credit loss -- that Freddie Mac reported during the Class Period on any subprime mortgage loan. In addition, even with the benefit of 20-20 hindsight, Plaintiff has not alleged any facts suggesting that Freddie Mac faces the risk of suffering any material credit losses on any subprime mortgage loan "with 'a high likelihood of excessive payment shock and possible foreclosure.'" AC ¶ 95. Finally, the statement respecting the amount of credit losses that Freddie Mac might incur in the future was a forward-looking statement accompanied by meaningful cautionary language, which is immune from liability. See supra Part II.B.3.

16. AC ¶ 96: 2006 Annual Report Disclosed on March 23, 2007.

Plaintiff fails to specify how and why the disclosures that it challenges in Freddie Mac's 2006 Annual Report are false or misleading. Plaintiff focuses, in particular, on the following statement: "With respect to our Retained portfolio, we do not believe that any meaningful amount of the agency securities we hold is backed by subprime mortgages." AC ¶ 96. The very next sentence in that Annual Report specifies **the precise amount** of those securities in Freddie Mac's Retained Portfolio:

> However, at December 31, 2006 and 2005, **we held approximately $124 billion and $139 billion, respectively, of non-agency mortgage-related securities backed by subprime loans**. These securities include significant credit enhancement based on their structure and more than 99.9 percent of these securities were rated AAA at December 31, 2006.

Id.; App. 3 at 69 (emphasis added); see supra Part II.A.3.a. Plaintiff does not contest the accuracy of that hard data. Plaintiff does not explain why those securities supposedly **did** comprise a "meaningful amount" of Freddie Mac's Retained portfolio, which held assets valued

at $700.5 million as of December 31, 2006. See App. 3 at 40. Nor does Plaintiff explain how any of the other statements it quotes from Freddie Mac's 2006 Annual Report was allegedly false when made.[38]

17. AC ¶ 97: March 23, 2007 Press Release.

Plaintiff alleges that, in a March 23, 2006 press release that accompanied its 2006 Annual Report, Freddie Mac supposedly "emphasized, falsely, that Freddie Mac did not face risk from its nontraditional mortgage exposure." AC ¶ 97. Again, that is not what the press release actually states. According to the Amended Complaint, Freddie Mac actually stated the following, which Plaintiff uses as the basis for its above-quoted distortion:

> We also maintained our low credit and interest-rate risk profiles, leaving us well positioned to deal with a broad range of interest rate conditions, and with the value of our shareholder's equity well protected.

AC ¶ 98. Read in the context of this press release accompanying Freddie's Mac's financial report for its 2006 fiscal year, that sentence refers to Freddie Mac's historical financial performance during 2006. See App. 22. Plaintiff does not contest the accuracy of any hard financial data that Freddie Mac reported for that year, or any other financial quarter or year within the Class Period. The statement about Freddie Mac being "well positioned to deal with a broad range of interest conditions" that might arise in the future is a forward-looking statement immune from liability and, in any event, is too vague to be actionable. See supra Part II.B.2-4.

18. AC ¶¶ 98, 99: March 23, 2007 Earnings Conference Call.

Plaintiff challenges as false three statements made during Freddie Mac's March 23, 2007 earnings conference call. See AC ¶¶ 98, 99. First, Plaintiff challenges as false Mr. Syron's representation that Freddie Mac's decision to change its policy for purchasing and guaranteeing hybrid ARM subprime mortgages was made, "not out of concern for [its] exposure to [those] products," "but rather, out of a desire to lead the market from a mission perspective." AC ¶ 98.

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[38] Plaintiff also alleges that the Company "falsely reported" that Freddie Mac's exposure to credit risk "remained **well controlled**." AC ¶ 96 (emphasis added). That statement is non-actionable corporate puffery. See supra Part II.B.2.

Plaintiff, however, fails to allege a single specific fact indicating that Mr. Syron's statement was false in any way. Plaintiff also does not contest the publicly-disclosed fact that all subprime loans then comprised approximately 1% of Freddie Mac's Guarantee portfolio. See supra Part II.A.3.a.

Second, Plaintiff challenges as false Mr. Piszel's statement that Freddie Mac's "asset quality remains very high, with retained portfolio subprime exposure limited to AAA securities." AC ¶ 99. Plaintiff fails to allege any facts tending to undermine the accuracy of those statements. In addition, the statement that Freddie Mac's asset quality remains "very high" is too vague to be actionable. See supra Part II.B.2. Finally, Plaintiff challenges as false Mr. Piszel's statement that "we have little to no exposure to subprime risk-layered mortgage products that have drawn so much note recently." AC ¶¶ 98, 99. Again, Plaintiff fails to plead any specific facts undermining the accuracy of that statement, such as the amount of "subprime risk-layered mortgage products" that Freddie Mac supposedly did hold at that time. See supra Part I.C. Plaintiff also fails to contest the accuracy of any of the historical financial information that Freddie Mac disclosed in connection with its March 23, 2007 earnings call.

19. AC ¶ 100: March 23, 2007 Bloomberg Article.

Mr. McQuade's alleged statement that "[w]e don't think we'll lose any money at all on subprime," AC ¶ 100, is a forward-looking statement accompanied by meaningful cautionary language, and thus immune from liability. See supra Part II.B.3.[39] Further, Plaintiff does not plead any specific facts showing that the challenge statement was false when made. See supra Part I.C. Indeed, Plaintiff does not allege that Freddie Mac reported any credit loss on any subprime investment during the Class Period.

[39] See, e.g., Grossman v. Novell, Inc., 120 F.3d 1112, 1122-23 (10th Cir. 1997) (cautionary language in registration statement conferred safe harbor protection to allegedly misleading forward-looking statement made during interview); San Leandro, 75 F.3d at 811 (cautionary language in Annual Report held to "bespeak caution" with regard to optimistic statements in press releases and newspaper articles); Raab, 4 F.3d at 289 (cautionary language in press release held to bespeak caution with regard to optimistic statement in contemporaneous Annual Report). See App. 3 at 21 (2006 Annual Report).

20. AC ¶ 101: April 16, 2007 Business Week Article.

Plaintiff quotes the following statement attributed to Mr. Piszel in an April 16, 2007 Business Week article: "Having [a lot of] size doesn't mean having [a lot of] risk." AC ¶ 101. That statement is a vague statement of opinion, which cannot be actionable as a material misrepresentation of fact. See supra Part II.B.2. In addition, Plaintiff fails to allege any facts undermining the accuracy of any statement attributed to Mr. Piszel. See supra Part I.C.[40]

21. AC ¶¶ 102, 103: May 14, 2007 Syron Remarks At UBS Conference.

In Paragraph 102 of the Amended Complaint, Plaintiff asserts that, on May 14, 2007, Mr. Syron "provided still further unqualified false assurances regarding FRE's ability to purchase subprime loans without risk." AC ¶ 102. The quote of Mr. Syron's actual statement reveals that he did not make any such statement or give any such assurance. Id. As the market was well aware and Freddie Mac elsewhere disclosed, subprime loan products carry more risk than prime loan products. See supra Part II.A.3.b. Plaintiff has not alleged any specific facts suggesting that what Mr. Syron actually said was false, or that he did not believe that his forward-looking statements were true when made. Further, other portions of Syron's remarks belie Plaintiff's overarching allegation that Freddie Mac failed to disclose its exposure to subprime loans. In his remarks, Mr. Syron specifically broke down the Company's exposure to subprime loans by portfolio, noting: "**[A]t the end of 2006, we had virtually no subprime exposure in our guarantee business and in our retained portfolio business . . . We had about $124 billion in AAA rated subprime exposure in our retained portfolio.**" App. 26 at 3 (emphasis added). Plaintiff does not plead a single specific fact that contradicts that disclosure.

In addition, in Paragraph 103 of the Amended Complaint, Plaintiff quotes numerous statements that are vague and indefinite statements of optimism, which are not actionable as a

[40] In fact, this Business Week article undermines Plaintiff's claims, as portions of it that Plaintiff selectively omitted discredit Plaintiff's core allegation that Freddie Mac had "substantial exposure" to subprime loans. See, e.g., AC ¶ 1. The Business Week article notes that Freddie Mac owns "$124 billion" in subprime loans, and that "subprime is only a small piece of [Freddie Mac's] overall business. Freddie's total portfolio tops $2.2 trillion." App. 25 at 1.

matter of law.[41] See supra Part II.B.2.

22. AC ¶ 104: May 17, 2008 Remarks At Lehman Brothers Conference.

The statements Plaintiff challenges in Paragraph 104 are identical to the statements that it challenges in Paragraph 103, and those statements are not actionable for the same reasons. See supra Part II.B.2.

23. AC ¶ 105: June 8, 2007 Remarks At Annual Stockholders' Meeting.

In Paragraph 105, Plaintiff challenges statements that are non-actionable corporate puffery. See AC ¶ 105 ("**good position** to weather," "risk management is another **comparative advantage**," and "we are **better positioned** than most market competitors"); supra Part II.B.2.

24. AC ¶ 106: June 14, 2007 Conference Call.

Plaintiff challenges the following three statements made during Freddie Mac's June 14, 2007 conference call: (1) "[t]hanks to our continued **high asset quality**, **low risk exposures** and **improving operations**, Freddie Mac is much **better positioned** for long-term profitability than a year ago"; (2) "**we will no longer** buy subprime mortgages **that pose an unacceptable risk of excessive payment shock and possible foreclosure**"; and (3) "**we continue to expect** no losses from our subprime-backed AAA rated AGS security exposure". AC ¶ 106. None of these statements is actionable. The first statement is not shown to be false and, in any event, is too vague to be actionable. See supra Part II.B.2. With regard to the second statement, Plaintiff fails to plead specific facts indicating that Freddie Mac **did** buy, after September 1, 2007, subprime mortgages that posed an unacceptable risk of excessive payment shock and possible foreclosure. See AC ¶ 95. The third statement is a forward-looking statement that was accompanied by meaningful cautionary language, and thus immune from liability. See supra Part II.B.3.

25. AC ¶ 107: June 14, 2007 Press Release.

Plaintiff alleges that Freddie Mac's June 14, 2007 press release provided a "false

[41] For example, the quoted statements contain the following vague and indefinite terms and phrases, none of which are actionable, as a matter of law: (1) "maintaining a disciplined approach"; (2) "will not **imprudently** chase growth"; (3) "**disciplined** approach to credit underwriting" and "**high** asset quality"; and (4) "Freddie Mac is **better positioned** than most market competitors."

financial **outlook**," and Plaintiff highlights the following three statements in support of its allegation: (1) "we **seized** market opportunities to grow our retained portfolio **prudently**"; (2) "**we remain encouraged** by the underlying fundamentals of Freddie Mac's business"; and (3) "[o]verall, Freddie Mac's credit guarantee portfolio continued to exhibit **credit characteristics that were better than historical averages as measured by current delinquencies, loan-to-value ratio (LTV), and charge-offs**." AC ¶ 107 (emphasis added). As Plaintiff acknowledges by using the term "outlook," the alleged statements are forward-looking statements, and since they were accompanied by meaningful cautionary language, they are immune from liability. See supra Part II.B.3. In addition, the first and second statements that Plaintiff challenges are non-actionable corporate puffery. See supra Part II.B.2. With respect to the third challenged statement, Plaintiff has not alleged any specific facts to challenge the accuracy of any of the specific metrics cited in the disclosure, i.e., current delinquencies, LTV, and charge-offs, that formed the basis of the statement.

26. AC ¶ 108: June 14, 2007 Conference Call.

Plaintiff challenges as false four statements from Freddie Mac's June 14, 2007 conference call. AC ¶ 108. Three of the statements that Plaintiff challenges contain numerous vague phrases that are not actionable, such as, "high asset quality," "low risk exposures," "improving operations," "much better positioned," "disciplined approach," "strong credit position," and "better than the market as a whole." AC ¶ 108. Second, the following three challenged statements are forward-looking:

- Thanks to our continued high asset quality, low risk exposures and improving operations, Freddie Mac is **much better positioned for long-term profitability** than a year ago. AC ¶ 108 (emphasis added).

- Also, we continue to **expect** no losses from our subprime-backed AAA rated ABS security exposure. AC ¶ 108 (emphasis added).

- [W]e do expect our credit-related metrics to worsen from their extremely low levels seen in the past few years but our overall strong credit position should enable us to weather the housing downturn better than the market as a whole. AC ¶ 108 (emphasis added).

Each of those statements was accompanied by meaningful cautionary language, and is thus immune from liability. See supra Part II.B.3.

27. AC ¶ 109: July 2, 2007 Bloomberg Article.

Plaintiff challenges as false certain statements allegedly attributed to Freddie Mac spokesperson Sharon McHale in a July 2, 2007 Bloomberg article. AC ¶ 109. To begin, the article itself, unlike Plaintiff's mischaracterization of the article, does not contain a statement by Ms. McHale about Freddie Mac's capital reserves. See App. 31. It contains an estimate by a financial analyst that Freddie Mac could suffer subprime-related credit losses of $3 billion on its AAA-rated subprime bonds. Id. at 1. The article states: "Freddie Mac spokeswoman Sharon McHale called the loss estimates 'absurd.'" Id. That statement of opinion respecting potential future losses is not actionable as a material statement of fact. See Raab, 4 F.3d at 290 ("Analysts and arbitragers rely on facts in determining the value of a security, not mere expressions of optimism from a company spokesman."). It is also a forward-looking statement immune from liability. See supra Part II.B.3. In addition, Plaintiff does not allege that the losses to which it alludes in Paragraph 109 of the Amended Complaint bear any connection to Freddie Mac's AAA-rated subprime bonds. Indeed, Plaintiff does not allege that Freddie Mac suffered any credit loss on its AAA-rated subprime bonds during the Class Period.

28. AC ¶ 110: July 28, 2007 Wall Street Journal Article.

Plaintiff challenges as false certain statements attributed to an unnamed Freddie Mac spokeswoman in a July 28, 2007 Wall Street Journal article. The article refers to an estimate by a financial analyst that the value of subprime mortgage bonds held by Freddie Mac had declined in value, as of that time, by $3 billion. AC ¶ 110. According to the article, the unnamed Freddie Mac spokeswoman called the estimate "mistaken." Id. She also allegedly stated that, as of that time, Freddie Mac had not seen "any material markdown in value." Id.

To begin, statements attributed to an unnamed spokesperson are not actionable. See Hershfang v. Citicorp, 767 F. Supp. 1251, 1256 (S.D.N.Y. 1991) (granting motion to dismiss securities fraud claims based on statement attributed to unnamed "Citicorp spokesman" and

noting; "[I]t goes without saying that defendant is entitled, under Rule 9(b), to know who made these allegedly fraudulent remarks, when they were made, and where they mere made. The complaint's attribution of newspaper reports to a 'Citigroup spokesman' utterly fails to meet this burden.") (citations omitted).

In addition, as discussed above, a statement of opinion about estimated future losses is not actionable as a representation of fact. See supra Part II.B.2. Further, the challenged statement is a forward-looking looking statement immune from liability. See supra Part II.B.3. Plaintiff also pleads no specifics facts to support its allegations that the statements attributed to the "Freddie Mac spokeswoman" were false when made. Specifically, Plaintiff does not plead a single fact indicating: (1) that Freddie Mac **did** **not** use third party sources to value its holdings; or (2) that Freddie Mac **did** **see** "any material markdown in value," as of that date. See supra Part I.C.[42]

29. AC ¶ 111: August 30, 2007 Conference Call.

On an August 30, 2007 earnings conference call, Freddie Mac provided, among other things, detailed disclosures concerning the specific composition of the Company's mortgage portfolio. Cherry-picking a handful of those statements from context, Plaintiff conclusorily asserts that the following statements falsely characterized Freddie Mac's risk: (1) "our overall exposure to higher risk products is low relative to our competition"; (2) "we have limited and manageable exposure to Alt-A and risk-layered products, such as those loans with both high LTV and low FICO scores"; (3) "delinquencies are low, but are trending up particularly in Florida and California"; (4) "our overall credit profile equips us to weather this downturn better than other market participants"; and (5) "When we put all this together on the credit front, from the regional exposure, product concentration and counterparty credit risk perspectives, we are well positioned for the current environment." AC ¶ 111. These statements are not actionable for several reasons.

[42] Plaintiff's allegations also fail for all of the same reasons that their allegations in Paragraph 109 fail, as a matter of law. See supra Part II.C. 27.

First, in context, these statements are forward-looking statements accompanied by meaningful cautionary language, and thus immune from liability. See supra Part II.B.3. Second, Plaintiff fails to plead any specific facts indicating how or why any of these statements was false when made. See supra Part I.C. Third, statements including terms such as "low," "manageable," "limited," and "well-positioned" are too vague to be actionable. See supra Part II.B.2.

30. AC ¶ 112: September 10, 2007 Remarks At Lehman Brothers Conference.

Plaintiff challenges six statements from Ms. Cook's remarks at a September 10, 2007 Lehman Brothers conference, claiming that these statements "falsely assured investors that Freddie Mac's investments in nontraditional mortgages were safe and would not subject Freddie Mac to write-downs." AC ¶ 112. Once again, Plaintiff distorts and mischaracterizes the actual statements that it challenges. Ms. Cook simply did not state either that: (1) "Freddie Mac's investments in nontraditional mortgages were safe;" or (2) those investments "would not subject Freddie Mac to write-downs." See App. 34.

Plaintiff also fails to plead any specific facts demonstrating how any of Ms. Cook's **actual** statements was false when made. Plaintiff does not challenge the accuracy of any of the hard data that Ms. Cook disclosed, such as her assertion that Alt-A and risk layered mortgage products then represented "about 8 percent of [Freddie Mac's] total single-family guarantee portfolio." AC ¶ 112. Certain of the challenged statements are also not actionable because they are vague and indefinite statements of optimism or forward-looking statements accompanied by meaningful cautionary language (e.g., we "believe Freddie is well positioned to succeed and produce shareholder value in the long term"). See supra Parts II.B.2, 3.

31. AC ¶ 113: September 17, 2007 Remarks At Bank of America Conference.

Plaintiff challenges several statements that Mr. Piszel made at the September 17, 2007 Bank of America Conference, claiming that Piszel "misrepresented Freddie Mac's risk exposure and falsely denied that Freddie Mac would write down any of its subprime portfolio . . . ." AC

¶ 113. As discussed above, this allegation is based on a mischaracterization of Mr. Piszel's remarks and a misunderstanding of the relevant basic accounting terms. See supra pp. 12-13.

32. AC ¶ 114: Mortgage Risk Magazine Article.

Plaintiff alleges that, in a Mortgage Risk magazine article entitled "Subprime Winner," Ms. Cook "gave further false reassurances concerning Freddie Mac's risk exposure." AC ¶ 114. Again, Plaintiff fails to support that conclusory allegation with any specific facts indicating that any single statement that the article attributes to Ms. Cook was false when made. Further, Plaintiff ignores the numerous disclosures in the article that detail Freddie Mac's exposure to nontraditional and subprime mortgages:

> In its **retained portfolio** Freddie Mac holds about **$120 billion** of MBS **backed by subprime loans**, which make up about **17%** of the total retained portfolio. However, **99.9%** of those bonds are **rated triple-A**. Likewise, in the guarantee portfolio (loans bought and packaged into MBS) characteristics such as **high loan-to-value ratios (LTVs) and low credit scores**, are **largely absent**. In the words of one analyst, Freddie's book of business is "about as good a book of loans as you could hope to find." The **single-family credit guarantee portfolio** includes **$102 billion of loans with original [LTVs] higher than 90%**, equivalent to **6%** of the full **$1.6 trillion book**. Loans to borrowers with a Fico **credit score lower than 620** make up **4%** of the **total portfolio**. But, significantly, loans with both original LTVs over 90% and Fico scores below 620 make up a tiny portion of the portfolio at less than **1%**.

App. 36 at 11-12 (emphasis added). As this article evidences, the market knew the precise extent of Freddie Mac's exposure to nontraditional and subprime mortgages, and Plaintiff does not allege that any of Ms. Cook's statements were false.

33. AC ¶ 117: November 7, 2007 Press Release.

Plaintiff conclusorily alleges that Freddie Mac's November 7, 2007 press release in response to the New York Attorney General Subpoenas "continued to conceal the fraud." AC ¶ 117. Plaintiff pleads no specific facts indicating exactly what information, or "fraud," the press release purportedly "concealed." See supra Part I.C. Nor does Plaintiff challenge as false or misleading any particular statement in the press release. Id.

Furthermore, Plaintiff neglects to bring to the Court's attention the judicially noticeable fact that Freddie Mac entered into a publicly disclosed cooperation agreement with the New York Attorney General's Office. ("Attorney General's Office"). Under that agreement, the Attorney General's Office agreed to terminate its investigation of Freddie Mac. App. 43 at ¶ 11 (Cooperation Agreement with the New York Attorney General's Office). The Attorney General's Office did not make any finding that Freddie Mac has engaged in any wrongdoing, as the agreement reflects. See App. 43 at ¶ 13.

III. PLAINTIFF'S SECTION 20(a) "CONTROL PERSON" CLAIMS SHOULD BE DISMISSED.

To establish "control person" liability under Section 20(a) of the 1934 Act, Plaintiff must show: "(1) a primary violation by a controlled person; (2) control of the primary violator by the defendant; and (3) that the controlling person was in some meaningful sense a culpable participant in the primary violation." In re Telxon Corp. Sec. Litig., 133 F. Supp. 2d 1010, 1032 (N.D. Ohio 2000) (citing Boguslavsky v. Kaplan, 159 F.3d 715, 721 (2d Cir. 1998)). As set forth above, Plaintiff has failed adequately to allege a primary violation of Section 10(b) and SEC Rule 10b-5. Accordingly, the Amended Complaint cannot state a claim for violation of Section 20(a), as a matter of law. Id.

Moreover, Plaintiff fails to allege a key component of Section 20(a) liability: as noted above, supra Part I.B, nowhere in the Amended Complaint does Plaintiff set forth allegations that each of the Individual Defendants culpably participated in any alleged fraud. See Telxon Corp., 133 F. Supp. 2d at 1032 (citing Boguslavsky, 159 F.3d at 721 (reciting culpable participation as an element of § 20(a) liability)). This failure independently requires dismissal of the Plaintiff's Section 20(a) claim.

CONCLUSION

For all of the foregoing reasons, the Amended Complaint should be dismissed, with prejudice. See Ford Motor Co., 381 F.3d at 572-74 (affirming denial of leave to replead); PR Diamonds, 364 F.3d at 698-700 (same); Miller, 346 F.3d at 692 (same); Ferro, 2007 WL

1691358, at *59-60 (dismissing securities claims with prejudice); Goodyear, 436 F. Supp. 2d at 904-05 (same). In this case, Plaintiff already has had an opportunity to amend its complaint. As the Sixth Circuit has observed, "we think it is correct to interpret the PSLRA as restricting the ability of plaintiffs to amend their complaint, and thus as limiting the scope of Rule 15(a) of the Federal Rules of Civil Procedure." Miller, 346 F.3d at 692. Indeed, "the purpose of the PSLRA would be frustrated if district courts were required to allow repeated amendments to complaints filed under the PSLRA." Id.

Respectfully submitted,

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Dated: September 2, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2008 a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's system.

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